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Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union

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Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union

to the European Commission
(Contract Number VT/2009/0541)

by Aukje van Hoek & Mijke Houwerzijl

With the cooperation of

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21 March 2011

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EXECUTIVE SUMMARY

1. Background and research question

The position of workers who are posted to another Member State in the framework of the provision of services has been a European concern for a considerable period of time. The Posting of Workers Directive (hereafter referred to as PWD), adopted on 16 December 1996 is one of the tangible results of this concern. The PWD aims to reconcile the exercise of companies' fundamental freedom to provide cross-border services under Article 56 TFEU (ex Article 49 TEC) with the need to ensure a climate of fair competition and respect for the rights of workers (preamble paragraph 5).

The European Commission has regularly monitored the implementation and enforcement of this Directive to assess whether the aims of the PWD were being met. A comprehensive monitoring exercise launched in 2006 by the European Commission¹ led to the assessment that the Directive's main shortcoming, if not all of them, could be traced to a range of issues relating to its implementation, application and enforcement in practice.

In July 2009 the European Commission launched a pilot project 'working and living conditions of posted workers'. As part of this project, two research projects were commissioned, which were launched in December 2009/January 2010. One concerns the economic and social effects associated with the phenomenon of posting of workers in the European Union (VT/2009/62). The other (VT/2009/63) concerns the legal aspects of the posting of workers in the context of the provision of services in the European Union, of which the present study is the result.

Aims, method and limitations of this study

General

This comparative study is based on 12 national studies² which examined the questions and difficulties that arise in the practical application of the posting of workers legislation, as well as its enforcement in practice. The study investigates not only the role of Member States authorities (primarily labour inspectorates) in adequately enforcing the Directive, but also the relevant activities of social partners. To this end, the national rapporteurs have conducted structured interviews, and studied legislation and case law. The national rapporteurs were aided in this process with a detailed questionnaire, composed by the lead researchers in close cooperation with the European Commission and the rapporteurs themselves.

Although a systematic review has been undertaken of the implementation, application and enforcement of the PWD in all the countries covered by this study, it should be

¹ COM (2006) 159 and the accompanying Staff Working Document SEC (2006) 439, as well as the follow-up communication COM (2007) 304, "Posting of workers in the framework of the provision of services: Maximising its benefits and potential while guaranteeing the protection of workers" and the accompanying Staff Working Document SEC (2007) 747.

² National experts were: Belgium: Filip van Overmeiren; Denmark: Lynn Roseberry; Estonia: Merle Muda; France: Barbara Palli; Germany: Monika Schlachter; Italy: Giovanni Orlandini; Luxembourg: Guy Castegnaro and Ariane Claverie; the Netherlands: Mijke Houwerzijl; Poland: Marek Pliszkiwicz; Romania: Christina Maria Ana; Sweden: Kerstin Ahlberg; United Kingdom: Keith Ewing.

noted here that the findings in some country studies are highlighted more often than others. There are two reasons for this uneven spread of attention. First, since the PWD addresses countries in their role as host state, countries with a predominantly sending role have less experience with the application and enforcement of the Directive. The second explanatory factor involves the extent to which certain systems stand apart from the others in respect of their method of implementation, their mode of application and/or their monitoring and inspecting tools, or in regard to the actors involved in their enforcement system.

Aims

There are three main aims to this study:

- (1) To provide a comprehensive overview of existing problems with the Directive's implementation and application in practice;
- (2) To provide a comprehensive overview of existing problems in enforcement of the rights conveyed by the Directive;
- (3) To assess the cause of the problems identified and make recommendations for their solution. In particular, the research study should determine whether difficulties and problems in implementing, applying and enforcing the PWD are caused by:
 - The national implementation method and/or the national application of the Directive;
 - The national system of enforcement;
 - The Directive as such; and/or
 - Insufficient transnational cooperation (or the lack thereof);
 - Other reasons.

With regard to the last aim, please note that analysis and recommendations represent the personal views of the authors and may not be regarded as the official position of the European Commission.

Choice of countries

The choice of countries included in the study was informed by five arguments:

- 1) The overview should include countries with a high incidence of posting, both as a receiving and a sending state.
- 2) The overview should cover a variety of low and high wage countries.
- 3) The overview should cover a variety of social models.
- 4) The overview should cover those countries which have experienced specific problems with regard to posting of workers as such and/or the implementation of the Directive as evidenced by high-profile cases.
- 5) The overview should cover relevant examples of best practices – e.g. in the area of comparability of working conditions and/or cooperation between relevant actors.

The countries that provided input to this comparative study included five predominantly host countries (importers of services performed by posted workers), viz., the 'continental social-market economy countries' Italy (IT) and Luxembourg (LUX), the Nordic countries Denmark (DK) and Sweden (SE) and the Anglo-Saxon United Kingdom (UK). The 'continental social-market economy countries' Belgium (BE), Germany (DE), France (FR) and the Netherlands (NL) play an important role as both sending and receiving states. Three predominantly sending countries (exporters of services performed by posted workers) were also studied to complete the picture: the Central and Eastern European countries Estonia (EE), Poland (PL) and Romania

(RO). This selection meant it was possible to study different implementation systems and social models from the perspective of both the receiving and the sending state. Moreover, both significant incidents and relevant practices would be covered from both perspectives.

Limitation to two sectors of industry

Part of the study is related to law and legal protection. This depends to a great degree on legislation and other generally applicable rules. However, protection through collective labour agreements (hereinafter mostly referred to as CAs or CLAs), enforcement by and cooperation between social partners and practical application of the Directive may be sector specific. In the interviews with social partners and government authorities it was deemed necessary to focus on specific sectors. Although national rapporteurs were encouraged to add individual cases or best practices from another sector, they were advised to limit the systematic research to a few specific sectors. A choice was made for the construction sector and posting by temporary work agencies. This choice was informed by several factors:

- 1) These sectors demonstrate specific characteristics in relation to posting;
- 2) They have a high relevance in practice;
- 3) They should be able to give a full overview of the different modalities of posting.

Restriction to legal aspects

Though this study aims to provide an overview of the application and enforcement of the PWD in practice, it is not an empirical study. Where information is given on the effectiveness of the system, it is based on self-assessment by the relevant national actors.

Main characteristics of the PWD

Personal scope of the Directive

The PWD identifies at Community level a set of national, mandatory rules of general interest to the host state which must be applied to posted workers. In doing so, it establishes a hard core of clearly defined terms and conditions of work and employment for the minimum protection of workers (laid down in Article 3 (1) a - g), which must be complied with by the service provider in the host Member State.

The Directive applies to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers to the territory of another Member State (excluding merchant navy undertakings in respect of seagoing personnel, see Article 1(2)). Pursuant to Article 1(3) it covers three transnational posting situations, namely:

1. posting under a contract concluded between the undertaking making the posting and the party for whom the services are intended;
 2. posting to an establishment or an undertaking owned by the group;
 3. posting by a temporary employment undertaking to a user undertaking operating in a Member State other than that of the undertaking making the posting;
- with the proviso, in all three situations, that there is an employment relationship between the undertaking making the posting and the posted worker during the period of posting.

For the purposes of the Directive, ‘posted worker’ means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works (article 2(1)). Furthermore, the Directive stipulates that undertakings established in a non-Member State must not be given more favourable treatment than undertakings established in a Member State (article 1(4)).³

Substantive scope of the PWD

The hard core of rules to be respected, as laid down in Article 3(1) of the Directive, covers the following areas of protection:

- (a) maximum work periods and minimum rest periods;
- (b) minimum paid annual holidays;
- (c) minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
- (d) conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- (e) health, safety and hygiene at work;
- (f) protective measures regarding the terms and conditions of employment of pregnant women or recent mothers, children and young people;
- (g) equality of treatment between men and women and other provisions on non-discrimination.

These rules must be laid down either in law and/or by collective agreements or arbitration awards which have been declared universally applicable⁴ in the case of activities in the building work sector (referred to in the annex), while Member States may choose to impose such rules as are laid down by collective agreements in the case of activities other than building work (according to Article 3(10), second indent). They may also, in compliance with the Treaty, impose the application of terms and conditions of employment on matters other than those referred to in the Directive in the case of public policy provisions (according to Article 3(10), first indent).⁵

Information, control and jurisdiction measures in the PWD

To ensure the practical effectiveness of the system established, Article 4 of the Directive provides for cooperation on information between the Member States. Liaison offices are designated to monitor the terms and conditions of employment and to serve as correspondents and contact points for authorities in other Member States, for undertakings posting workers and for the posted workers themselves. Pursuant to Article 4(3) of the Directive, each Member State also takes the appropriate measures to make the information on the terms and conditions of employment referred to in Article 3 generally available. Besides this, it is stated in Article 5 that the Member States shall take appropriate measures in the event of failure to comply with the PWD. In particular they have to ensure that adequate procedures are available to workers

³ See also Recital 20 of the Directive, which indicates that the Directive does not affect either the agreements concluded by the Community with third countries or the laws of Member States concerning the access to their territory of third-country providers of services. The Directive is also without prejudice to national laws relating to the entry, residence and access to employment of third-country workers.

⁴ See in this respect also Article 3 (8) which provides for further possibilities in the absence of a system for declaring collective agreements universally applicable.

⁵ Article 3 (10). See for further details also the Communication of the Commission on the implementation of Directive 96/71/EC, COM (2003) 458 final, 25.7.2003.

and/or their representatives for the enforcement of obligations under the PWD. The Directive also contains a jurisdiction clause in Article 6, which states that judicial proceedings may be initiated in the Member State in whose territory the worker is or was posted.

2. Legal context of the PWD: private international law and national labour law

In chapter 2 we describe the legal background against which the PWD operates. We deem this necessary for the following reasons:

- to make clear that the PWD cannot be interpreted in isolation but must be read in connection with private international law (PIL);
- to foster a deeper understanding of the impact of the PWD on the national systems; and
- to identify problematic areas in the interaction between the systems which any instrument on the application and enforcement of the PWD has to take into account in order to be effective.

The PWD and the law applying to the contract of employment

The PWD deals with the law applying to the labour relationship of posted workers. To a great extent this topic is also covered by the rules of private international law (PIL). The PWD recognizes this overlap by explicitly referring to the Rome Convention 1980 in its preamble.⁶ More implicitly, private international law plays a role in Article 3(1) which states that “Member States shall ensure that, *whatever the law applicable to the employment relationship* (emphasis added AH/MH), the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters...”. Thus, it is made clear that the law applying to the labour contract is regulated by private international law (currently the Rome I Regulation), but the PWD superimposes – if necessary – the minimum protection of the laws of the host state upon the protection already offered under the law applying to the contract by virtue of the Rome I Regulation.⁷

PIL rules are geared to the individual case. Article 8 Rome I Regulation tries to identify which law is most closely connected to the individual contract of employment, taking into account the circumstances of the case.⁸ The place of work plays an important role in this determination, but is not always decisive. In particular, in case of short-term postings the contract will remain subject to the law of the *habitual* place of work. This rule ensures a certain measure of continuity with regard to the law applicable to the individual contract. This was deemed to outweigh the interest of subjecting all workers employed within the territory of a specific state fully and exclusively to the law of that state. The habitual place of work may often coincide with the country of origin of the employer, but in legal terms these are distinct connecting factors. Hence, it is important to realize that the application of the law of the country in which a posted worker normally works to the individual contract of employment, is based on the Rome Convention and Rome I Regulation and in principle not on the rules governing the internal market.⁹ Moreover, it should be kept

⁶ See preamble paragraph 6-11. See also footnote 3 of Chapter 2 in the full report p. 14.

⁷ Compare with regard to the relationship between the Rome I Regulation and the PWD: Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization Com(2002)654final p. 36.

⁸ Green Paper Rome I Com(2002)654, 35 ff.

⁹ The exact interaction between the rules of the internal market and the choice of law rules of the Rome I Regulation is currently not clear. However, it is clearly established that the country of origin principle as laid down in the Services Directive is not decisive for the law applying to the labour contracts of posted workers. See Directive 2006/123/EC of the European Parliament and of the Council of 12

in mind that under the system of Rome I Regulation and the Rome Convention the place of establishment of the employer as such does not suffice for the posted worker to be subjected to the law of the sending state. However, the place of establishment is crucial for the application of the rules on internal market. In order to be able to profit from the freedom to provide services, the employer must be "established" in a Member States, i.e. actually pursuing an economic activity there on a stable basis, before he can post workers to another Member State.¹⁰

The PWD seems to refer to the 'habitual place of work' criterion as used in the Rome I Regulation and the Rome Convention, where it states in Article 2(1) that 'posted worker' means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State *in which he normally works* (emphasis added AH/MH). However, in the section on the connection between the PWD and private international law we conclude that there is a basic tension between the individualized approach of private international law and the more general, collective approaches of collective labour law and public enforcement practices. To make these systems match as far as possible, the criteria that are used to monitor compliance with Article 2(1) of the PWD should, as far as possible, (also) take private international law considerations into account. As far as the applicability of the special regime of the PWD is concerned, the Member States and the EU should ensure that during the posting there is a real and relevant link between the sending state and the employment relationship of the posted worker. This requirement, which is based on the definition on 'posted worker' in Article 2(1) of the PWD as well as on private international law considerations, is to be treated separately from the requirement under the Treaty that the employer has to be genuinely established in an EU Member State in order to profit from the free provision of services and the requirement of Article 1(3) that there should be an employment relationship between the undertaking making the posting and the worker during the period of posting. The fact that the employer bears the costs of the posting could be used as one of the indicators for establishing a relevant connection of the employment relationship with the sending state.

The specification of the relevant criteria for posting is best achieved at EU level (see recommendation 1, Chapter 5).¹¹ At national level some Member States should pay (more) attention to the protection of workers posted from their territory. It may be necessary to assess whether workers who are posted from a specific Member State are actually still protected under its labour laws, in order to avoid lacunae in the legal protection of posted workers¹² (recommendation 2 in Chapter 5).

The PWD and national systems of labour law

Difficulties have been reported in several countries in their attempts to reconcile the PWD and internal market case law with their system for the establishment of labour

December 2006 on services in the internal market *OJ L 376*, 27.12.2006, p. 36–68 14, preamble paragraphs 82, 86-87.

¹⁰ One should distinguish the question whether the employer is a service provider in the meaning of the TFEU from the question which law applies to the contract of employment of the worker performing the service. Not all employees of cross-border service providers are posted workers: some may be hired locally in the place of performance or work there on the more permanent basis. The recent judgment in the *Vicoplus e.a* case (C-307/09- 309/09) supports the distinction thus made between the status of the employer as a service provider and the status of the worker.

¹¹ Section 5.2 p. 174.

¹² See for more details Chapter 2.2, p. 18 and Chapter 5.2, p.174.

standards. The "erga omnes" approach as well as the conditions laid down in Article 3(8) have given rise to difficulties not only in Sweden and Denmark, with their tradition of autonomous standard setting (often at company level), but also in Germany and Italy, and even in the UK (in sectors such as the construction industry, where relatively strong trade unions still exist). Moreover, the effect of the existence of the PWD on the interpretation of the treaty provision on the free movement of services (as evidenced in the Rueffert and Laval cases) may affect the possibility to set labour standards through other mechanisms than those provided for under the PWD such as social clauses in contracts of (private and/or public) procurement.

Several Member States have amended their system to comply with the PWD and the case law of the ECJ. However, not all Member States have currently made use of the means available to them to counter the effects of the 'Laval quartet'. As far as pertinent for them, they should take the following measures (recommendation 3)¹³: 1) If relevant, make explicit reference to the autonomous method as a means of setting minimum standards. 2) Identify the relevant CLA's and the relevant norms within those CLA's. 3) Ensure transparency of labour norms and standards contained in CLA's. 4) Ensure non-discrimination in the application of non-legislative standards.

However, even when the Member State take all these measures, some controversial points remain which can only be resolved at EU level. On most points regarding Article 3(8) we do not advise any amendments since (1) action at national level seems to take away most of the problems that are acknowledged by all relevant stakeholders; (2) host and sending countries as well as social partners are divided with regard to the remaining issues. Nevertheless, we think action at EU-level is necessary regarding the protection and the exercise of the fundamental right to collective action (see recommendation 4)¹⁴, as well as regarding the possibility to impose social clauses in public procurement contracts (see recommendation 5, Chapter 5).¹⁵ The need for EU action in these areas arises from the considerable legal uncertainty on points involving fundamental rights and/or international obligations as well as the possible horizontal effects of the ECJ case law. Moreover, the uncertainty in the area of collective action is unlikely to be cleared up by additional ECJ case law in the immediate future.¹⁶

As to collective action, the case law of the ECJ has left uncertainty as to the role the unions may play in defending the rights of posted workers. According to the authors of this study it is worth specifying to what extent Article 3(7) rather than Article 3(8) could be applicable to a situation in which the unions merely support posted workers in their negotiations with their employer on the employment conditions during the posting. Similarly, Article 5 of the PWD may be relevant when unions use collective pressure in order to ensure enforcement of already applicable rules. We recommend that the EU uses the adoption of a new legislative initiative to improve the implementation, application and enforcement of the directive to clarify the distinction between collective action meant to impose host state standards in the meaning of Article 3(8) on the one hand and collective action by posted workers in order to reach agreement on better working conditions as covered by Article 3(7) or enforce rights

¹³ Section 5.2, p. 178.

¹⁴ Section 5.2, p. 179; see also the discussion of contentious cases below.

¹⁵ See Section 5.2, 'The PWD and national systems of labour law – problems caused by Art. 3(8) PWD and ECJ case law,' p. 175 ff and recommendations 3-5.

¹⁶ Section 5.2, p. 180.

granted under Article 5 on the other hand.¹⁷ Another problem which merits attention is the effect of damages on the effective enjoyment of the right to strike. It may also be worthwhile to consider the suggestion in the 'Monti report' to introduce a provision ensuring that the posting of workers in the context of the cross-border provision of services does not affect the right to take collective action.¹⁸

With regard to the possibilities for Member States to include social clauses in public procurement contracts, it should be clarified to what extent adherence of the Member States to Convention No. 94 may actually violate EU law and in particular whether the obstacle which social clauses may cause to the freedom to provide services may be justified by overriding reasons of the general interest, taking into account the values promoted by Convention No. 94.

¹⁷ A further reinstatement of the freedom of the unions of the host state to induce adherence to local collective agreements (as a means of general standard setting) seems to require a rephrasing of the requirements of Article 3(8). In our opinions this could be done by replacing the current emphasis on general applicability/application by clear requirements of non-discrimination and transparency.

¹⁸ Modeled after Regulation (EC) No 2679/98 (the so-called Monti Regulation). See: M. Monti, A new Strategy for the single market, 9 May 2010; see also the follow-up in Proposals 29 and 30 of the Communication from the Commission, Towards a Single Market Act. For a highly competitive social market economy. 50 proposals for improving our work, business and exchanges with one another Brussels, 27.10.2010. COM(2010) 608 final.

3. Detailed review of the PWD's implementation and application

Chapter 3 deals with existing problems in the implementation and application of the Directive in practice. The main focus in this part of the research concerns Articles 1 and 2 of the PWD, regarding the concept of posting and of posted worker, and Article 3 of the PWD, regarding the posted worker's terms and conditions of employment. Since the social partners may be involved in both the implementation and the application of these articles of the Directive, relevant aspects of their involvement are also examined. As an illustration of the problems that arise in practice with regard to the concept of posting and as regards the legal position of the posted worker, the transitional regime implemented upon the accession of the new Member States in 2004 and 2007 is also studied. Moreover, an overview is provided of contentious cases reported in the media.

Personal scope of the directive

General remarks

The Directive aims to coordinate the laws of the Member States by laying down clearly defined rules for minimum protection of the host state which are to be observed by employers who temporarily post workers to perform services on their territory. For this type of services the PWD - as interpreted in the light of the ECJ case law – creates a legal framework in which the labour protection of the host country is deemed to apply, but only to a limited extent. Hence, according to the authors of this study, the category of posted workers form a middle ground between mobile workers who are temporarily present in the territory of another Member State but are not covered by its laws¹⁹ and mobile workers who are deemed to have become part of the labour force of the host state and hence are covered by its laws in their entirety.

The Directive contains criteria for distinguishing postings from other types of labour mobility. These criteria cause problems of interpretation and delineation, which will be discussed below. In order to avoid such problems several Member States have chosen not to include the personal scope criteria used in the PWD in their implementing statutes, but to apply instead the relevant²⁰ standards of labour law and labour protection to anyone working within the territory (or similar criteria). A clear disadvantage of this latter method of implementation is that it may lead to over-application of the implementation measure. This may result in excessive burdens on the free movement of services insofar as the national protective laws also apply in situations where such application is ineffective and/or disproportionate. Hence

¹⁹ E.g. a worker attending a seminar or training in another Member State.

²⁰ The PWD contains a list of standards which are relevant in this respect, but some Member States extend the protection beyond the fields of protection enumerated in the directive. For example, the UK has no implementing statute but applies all of its statutory protection to posted workers based on the individual scopes of application of the statutes themselves.

Member States are advised to introduce the concept of posting in their legislation (recommendation 6).²¹

The analysis of cases²² that have attracted media attention gives a clear indication that the most controversial ones often pertain to situations of ‘creative use’ of the freedoms in which the provision of services is used to avoid (full) application of the host state’s law. The examples include the setting up of letter box companies which then hire workers specifically to post them to other Member States and incidences of consecutive postings of a single worker to a single Member State by different ‘employers’ in different Member States.²³ Whereas in some cases, one may doubt whether the employer is genuinely established in the sending state, in other cases a link between the employment contract and the state of establishment of the employer is missing. A clear and enforceable definition of both the concept of posting and the concept of posted worker, based on the purpose of the Directive, might help to counter this. Moreover, to prevent employers from circumventing and abusing the rules it is necessary to establish a clear definition of ‘undertakings established in a Member State’ (see e.g. in art 4(5) of the Services directive 2006/123/EC). Only genuinely ‘established’ companies may benefit from the freedom to provide services and hence from the PWD.

Problems with regard to specific criteria used in the PWD

According to Article 2 of the PWD, the worker should be posted ‘for a limited period of time’ to a Member State other than the one in which he ‘normally works’. However, the Directive does not contain any indication as to the temporary nature of the posting, nor on the way one should establish whether there actually is a country in which the employee normally works. The national implementation measures do not as a rule contain any specific criteria, either. Some Member States have taken precautions to limit abusive practice (e.g. LUX, FR), which focus on the establishment of a genuine link between the employer and his country of origin. It is rare, however to find special provisions which focus on establishing a genuine link between the worker and his habitual place of employment within the said country.²⁴

Regarding the definition of ‘a limited period of time’, it is highly recommended that the definition of temporary posting in Art. 2 PWD should be clarified, either by including a rebuttable presumption of permanent mobility in case the duration of the posting exceeds a specific period, and/or by indicating which minimum links to the country where the posted worker normally works should exist in order for that mobility to qualify as posting under the PWD (recommendation 11, Chapter 5). In both cases, care should be taken to comply with the Treaty requirements under the free movement of services. To stress the distinction between ‘passive mobility’ of a worker posted in the framework of service provision of his employer and ‘active mobility’ of a worker entering the labour market of another Member State to take advantage of job opportunities, it may be advisable to amend the text of Article 3(7) second sentence of the PWD by making the reimbursement of expenditure on travel,

²¹ Section 5.3 ‘Distinguishing posting from other types of mobility - problems caused by (lack of) implementation and application at national level’, p. 182 – 183.

²² See section 3.5, p. 54 ff. and Annex I.

²³ For more examples, see section 3.5, p. 54 ff.

²⁴ France has a provision which excludes employees hired in France from the scope of application of their implementing rules. L 1262/3, see Chapter 3.2, p. 32 and p. 46.

board and lodging/accommodation an obligation on the service provider (recommendation 12, Chapter 5). In any case, but in particular if no agreement on these points can be reached at EU level, the Member States themselves should ensure that the genuine nature of the temporary posting is maintained in a transparent and effective way by the monitoring and enforcing authorities (recommendation 13, Chapter 5).²⁵

The PWD must be situated in the context of the free provision of services as protected by Article 56 TFEU. However, not all national implementation measures restrict their application to cases in which a cross-border service is provided by the employer to a service recipient in another Member State. A case in point, which raises discussion in several Member States, is the trainee who is sent abroad as part of his or her training program.²⁶ A trainee is present in the territory of the host state for professional reasons, and may be benefiting from the freedom to *receive* services, rather than *providing* such. With regard to two types of posting, the PWD seems to require the existence of a service contract between the employer and the recipient of the service in the host state.²⁷ A strict interpretation of this requirement would bar application of the PWD to postings in which the contract of employment is entered into by a distinct entity from the service provider.²⁸ In our opinion the existence of an intermediary between the employer and the recipient of the services should not prevent application of the Directive in cases which otherwise fit the objectives of the Directive. It is advisable to clarify and if necessary amend both requirements to fit the purpose of the Directive (recommendation 7, Chapter 5).²⁹ In the absence of a solution at EU level, a further clarification by the Member States would be welcomed.

Problems with regard to specific sectors

The concept of posting workers in the framework of transnational provision of services in the PWD includes temporary agency workers. However, the status of these workers in the context of the internal market is a matter of debate. In his opinion in the *Vicoplus* case, Advocate-General Y. Bot noted that although the employer is taking advantage of the free movement of services, the temporary agency worker might (also) be falling within the scope of the transitional regime allowing Member States to restrict the free movement of workers.³⁰ In its judgment of 10 February 2011 the ECJ followed the conclusion of the AG on this point.

Pursuant to Article 3(9) of the PWD, host states may determine that posted TWA workers should be guaranteed equal protection to that of national TWA workers. It is

²⁵ Section 5.3, p. 185 – 186.

²⁶ The point was raised specifically in the reports of the Belgian and Luxembourg experts. In these countries criteria have been developed to determine the application of the PWD to trainees. The application of the implementation measure to trainees is yet unclear in the UK and the Netherlands. See also Chapter 3.2, p. 40-41.

²⁷ Explicitly required in Art 1(3) a, and implicit as regards Art 1(3) c postings.

²⁸ The Swedish expert discusses the position of the driver in international transport performing a cabotage activity in a situation where a forwarding agent has entered into the contract of cabotage. The German expert mentions the situation of double posting in which a worker is posted domestically to a user company which then posts the worker to another Member State.

²⁹ Section 5.3 'Posting in the framework of the provision of services – problems caused by the Directive' p.183-184. See for further illustration of the problem Section 3.2 'provision of a service', p. 40-43.

³⁰ Conclusion of 9 September 2010, Joined cases C-307/09 to C-309/09. See also C-113/89 (*Rush Portuguesa*).

currently unclear how this special provision interacts with the TWA Directive and the interpretation of the Treaty provisions. A clarification of the interaction between the TWA Directive and PWD would be welcomed (recommendation 8, Chapter 5).³¹

Though the Directive does apply to transport workers (with the exception of seagoing personnel of the merchant navy), the system of the Directive is ill fitted to deal with workers who do not work *in* a specific country but rather *from* a specific country. The PWD is most often deemed to apply to cabotage, but the effectuation of the monitoring of the protection is highly problematic. Furthermore, certain requirements in the PWD (notably the presence of a service contract between the employer and a recipient in the host state) may block application of the protection to transport workers, even in the case of cabotage. It seems advisable to formulate a sub-rule for applying the PWD to transport workers. In its absence, and awaiting a European solution, Member States may involve the national social partners in the sector to determine the proper application and enforcement of the PWD to this sector (recommendation 9 and 10, Chapter 5).³²

The transitional regime

Several ‘old’ Member States (EU15) applied or still apply a transitional regime with respect to the free movement of workers from eight of the ten new Member States in 2004 (EU8) and the two other new Member States (Romania and Bulgaria, EU2) which acceded in 2007. Only Germany and Austria also negotiated the possibility to impose restrictions to the free movement of services insofar as these involve cross-border posting of workers. A study of the transitional regime is interesting in the current context for several reasons.³³

- The actions taken by the Member States during this period may provide information about those areas which are deemed problematic in respect of labour mobility within Europe.
- In countries that allow the free provision of services but not the free movement of workers, the transitional regime sheds light on where the Member States draw the line between the two freedoms.

With regard to the first aspect, it is interesting to note that in both Belgium and the Netherlands, lifting the transitional regime was made to depend on measures that would ensure improvements in the enforcement of labour law and mobility monitoring. It underlines the importance of effective means of enforcement of national labour protection for the regulation of migration in general and posting in particular. In this respect a study of the measures adopted during the transitional period may also provide information on best practices with regard to combating abuse.

Several countries adopted measures meant to ensure that the worker is in a ‘genuine’ posting situation. The Netherlands, for instance, would check whether the sending company was genuinely established in the home country and performed regular economic activities there or was rather a letterbox company. In Denmark the required

³¹ Section 5.3 ‘temporary work agencies’ p. 185 – 186.

³² Section 5.3 ‘transport workers’ p. 187.

³³ For a more detailed description of the transitional measures, see section 3.4, p. 51-53.

residence permit would only be granted if certain requirements were met. These included requirements as to the permanent character of the employment in the posting enterprise as well as the requirement that the posted worker should have the intention and be able to return to his home country or the business's country of domicile when the work is completed. Luxembourg and France also imposed restrictions, e.g. by demanding a period of previous employment in the home state. Several judgments of the ECJ have shown that such requirements or practices may cause problems of compatibility with EU law (be disproportionate). This should encourage Member States to re-evaluate their systems in order to check for incompatibilities. However, both the measures and the evaluation of the ECJ of some of these measures draw attention to the necessity and difficulty of finding clear criteria to distinguish posting from other types of workers' mobility.

As regards the distinction between free movement of workers and the free provision of services, a major conflict has arisen around the position of TWA workers (see above, footnote 30). Their status has recently been the object of a preliminary procedure instigated by service providers in the Netherlands, where, from 1 December 2005 on, only type 1 posting (pursuant to Article 1(3)(a)) was deemed to be exempted from the transitional regime.³⁴ The ECJ found the application of transitional measures to workers sent to the Netherlands by temporary work agencies established in the new Member States, to be consistent with EU law. These workers were deemed to enter the Dutch labour market.

Overview of contentious cases

In our questionnaire we asked the national experts to provide a survey of contentious cases, both in court and in the media. There were three purposes to this exercise:

- To identify trends in the countries and sectors where problems are reported.
- To identify the contentious aspects of posting. In particular we are interested in such patterns of facts as might recur in the surveys.
- To identify general trends in the enforcement of the PWD.

As to the first point, there has been and still is a heated debate – leading to numerous cases (in particular in the public discussion) – in the 'old' Member States Germany, Belgium, Luxembourg, France and the Netherlands. There is much less interest on the part of the sending states such as Estonia, Poland and Romania. The discussion in Sweden, Denmark and the UK is of fairly recent date and focuses very much on the position of the social partners.

If the reported cases are organized by sector, three sectors stand out: TWAs, construction, and transport by road. Agriculture has also produced a decent crop of cases, but these are often not strictly related to posting. Other sectors which are more incidentally mentioned are health services, shrimp peeling, retail, cleaning and meat cutting.³⁵

³⁴ For (reference to) more details on the evolution of the Dutch transitional regime with regard to situations of posting, see Chapter 3.4, footnote 74, p. 52.

³⁵ See Annex I of the comparative study and for an extensive analysis Chapter 3.5, p. 54 – 60.

Both in the media and in the few court cases that were traced, posted workers are rarely identified as a specific category of workers. Apparently, other types of mobility may cause comparable patterns of facts, even though the legal position of the worker may differ. This can be explained by the fact that in everyday practice, employers and workers alike seem to be more interested in the opportunity to work abroad than in the precise legal status of their activities. The overview of cases which have attracted popular attention does clearly illustrate that contentious cases often relate to situations which should not be classified as ‘proper’ posting, for instance because the worker does not normally work in another state than the host state, or because the undertaking posting the worker is not ‘established’ in the country from which the posting takes place. Finally, an employment relationship between the employer and the posted worker may be missing. This again stresses the need for a more precise and enforceable definition of the concepts of ‘posting’ and ‘posted worker’.

Finally, it should be noted that unions can play an important role in the practical enforcement of the PWD. When recourse is had to industrial action in the context of posting, this invariably attracts media attention. However, it is reported – especially from the UK – that unions have become wary of offering the support of such action as a result of the Laval judgment. This increases the risks of wildcat strikes, and seems to be detrimental to the problem resolving quality of such actions.

Substantive scope of the Directive

The Directive contains a list of areas of protection establishing the ‘hard nucleus’ of protection for which Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment laid down in their laws and generally binding collective agreements. Under the current interpretation of the Directive by the ECJ the host state may only impose protection in other areas if the state can justify that on the grounds of public policy. The exhaustive character which is thus afforded to the Directive focuses attention on the limits of the concepts used therein. In this part of the study we focus on the interpretation of these concepts besides identifying the problems arising in the application of the specific types of protection.

Wages and working time

The rules on wages are identified by most experts as of paramount importance, besides safety and health and, to a lesser degree, working time and holidays. They can be regarded as the ‘hard nucleus of the hard nucleus’ of protection. In other words, the hardest core within the hard core of rights. However, the interpretation of the concept itself is uncertain and its application in practice is fraught with difficulties.

The Directive delegates the definition of the concept minimum rates of pay to the Member States. Moreover, the Directive specifically allows the Member States to use universally applicable collective agreements as a means to establish minimum protection in the areas covered by the PWD. However, the PWD does not provide a clear answer to the question of whether the host state can only impose a single minimum wage (flat rate) or rather a set of rules determining the minimum rate of pay in the individual case (wage structure / job ladder). These two pay levels may differ

considerably. Hence, if the PWD is to create a level playing field, the application of the entire wage structure is of paramount importance.

Apart from this discussion of the concept of ‘minimum’, it should be noted that the concept of ‘rates of pay’ is also far from clear. Which labour condition should or should not be taken into consideration when determining the minimum rates of pay? Moreover, there is much confusion about the standards to be used for comparing the wages actually paid to the minimum prescribed by the host state. A related (but not identical) problem of comparison is raised by the possibility that the worker may rely on better protection offered by the law of the sending state as provided for by Article 3(7).

Problems identified in the reports concern inter alia:

- Contribution to funds;
- The possibility to combine levels of protection, in particular with regard to overtime rates³⁶;
- Comparability and exchangeability of special benefits³⁷;
- Special payments related to the posting and the distinction between pay and reimbursements of costs;
- Complications caused by taxes and premiums (the gross/net problem);
- Withholding of costs from the wages due to the worker.

Member States and social partners have taken initiatives to counter the problems caused by this uncertainty. Not only have some of them undertaken efforts to identify the applicable provisions in more detail, they have on occasion also supplied means to transform the rights contained therein to better suit the situation of the posted worker. The examples provided in the full report could serve as best practices.³⁸ However, with regard to both the limits of the concept of ‘rates of pay’ and the standard(s) for comparison there is a clear need for European guidelines (see recommendation 15, Chapter 5).³⁹

A separate problem concerns the relation between the wages paid and the number of hours worked. This problem is partly caused by the rules on minimum wages in the Member States themselves. If minimum rates are fixed by the hour, the number of hours worked directly impacts on the wages paid at the end of the day, week or month. On the other hand, monthly wage rates may result in very different effective hourly wage costs, depending on the number of hours worked. Hence, Member States are encouraged to introduce an hourly minimum wage when this is not already in place (recommendation 16, Chapter 5).⁴⁰

³⁶ The Polish report specifically mentions the problem of combining the (higher) overtime charge of the sending state with the (higher) basic payment level of the host state. See for more examples Chapter 3.6, p. 75.

³⁷ In the Dutch / German context the question was raised of the interchangeability of a time saving funds with a holiday fund. The Italian report mentions problems as regards mutual recognition of adherence to funds in the construction sector. See Chapter 3.6, p. 76 for more details.

³⁸ Section 3.6 ‘Best practices in applying the rules on wages and working time,’ p. 75 – 77.

³⁹ Section 5.4 Rates of pay – constituent elements and comparison, p. 191-192.

⁴⁰ Section 5.4 ‘Effective hourly rates,’ p. 192-193.

However, with regard to effective hourly wage costs, the larger problem seems to be the (national) supervision and enforcement of working time provisions. This also holds with regard to the right to paid holidays. Although officially part of the hard nucleus, this right seems to be barely relevant in practice. Only when the right to paid holidays is effectuated through a special holiday fund do the right itself and its enforcement take on practical relevance.

Other areas of protection in Article 3(1)

The application of local rules of safety and conduct is not contested and does not raise particular difficulties. The main difficulties that arise in practice in this area concern the practical enforcement of safety regulations and effective communication in a multilingual workforce.⁴¹ However, health and safety regimes contain a large variety of rules and regulation ranging from safety requirements with regard to the workplace, from the obligation to perform regular risk assessments to liability schemes for industrial accidents.⁴² Member States differ in their interpretation of the scope of application of the provision on safety and health in Article 3(1). A clarification of this issue would be welcomed (recommendation 17).⁴³

Moreover, the safety and health regimes of some of the Member States contain obligations, such as training requirements for workers in dangerous workplaces and compulsory health checks prior to the commencement of work⁴⁴, which may cause problems of mutual recognition and coordination and raise questions as to their compatibility with prevailing EU law. These problems would to a great extent be resolved if all Member States had similar systems of certification and monitoring, which would then be mutually recognized.⁴⁵ Unfortunately such is not the case.

A different problem of coordination arises with regard to liability for accidents and compulsory insurance against occupational risks. The Member States have differing systems for dealing with occupational risks, varying from wide coverage through social security, sometimes in combination with a bar on civil liability; coverage through tort law, sometimes with special rules on the burden of proof; and coverage by special compulsory insurances, often contained in collective agreements. Currently, coordination between the different systems is less than perfect, whereas the compatibility with EU law also merits further examination.

The same holds for the protection of pregnant women and recent mothers. In particular, the very divergent rules on special leave may cause coordination problems.⁴⁶ However, the stakeholders do not report any problems in this respect, as the larger group of posted workers is not in practice affected by the rules. This is also true of the protection of minors. The rules on non-discrimination are not reported as being problematic, either.

⁴¹ Problems of enforcement are reported in the DK, IT, Lux, Sw. Language problems are reported in Lux and B. PL: no problems in this respect! See Chapter 3.7, p. 78-82.

⁴² See section 3.7 'Structure of the health and safety regimes' p. 79-82.

⁴³ Section 5.4 'Health and safety,' p. 193 – 194.

⁴⁴ Italy, France, Luxembourg. See Chapter 3.7, p. 80-82.

⁴⁵ Recommendation 18, section 5.4 'Health and safety' p. 194.

⁴⁶ See Section 3.7 'Protective measures aimed at special groups' p. 83 – 86, and 'Protection against discrimination' p. 86 - 87 as well as Section 5.4 'other areas of protection', in particular p. 193 - 195 and recommendations 19, 20 and 21 for the protection of pregnant women and women who have recently given birth and p. 194 for protection of minor and non-discrimination.

The rules on temporary work agencies do play a role in practice, especially insofar as Member States subject this economic activity to restrictions and/or special authorization. Though application of these restrictions to cross-border posting is in accordance with Article 3(1)(d) PWD), the restrictions themselves will have to be evaluated in the light of Article 4 of the TWA Directive. The PWD also allows the protection offered to posted TWA workers to be extended to the level of protection offered to local TWA workers (in accordance with Article 3(9) PWD). This provision interacts with Article 5 of the TWA Directive. The EC is advised to monitor the implementation of the latter Directive with special regard to the position of posted workers (recommendation 8, Chapter 5).⁴⁷

Public policy Article 3(10)

In its judgment in the *Commission v. Luxembourg* case of June 2008 (C-319/06), the ECJ made it clear that any extension of the protection not envisaged under other headings of the Directive has to be justified on the basis of public policy. Accordingly, the relevance of Article 3(10) for effective protection of posted workers is directly related to the interpretation of the hard nucleus of protection under Article 3(1). The national reports contain several examples of protection which – awaiting further clarification of the terms used - could be either included in the notion of public policy or subsumed under one of the heads of protection mentioned in Article 3(1). Sweden does not base itself on Article 3(10) to justify the application of its statutes on part-time and fixed term work, because these are deemed to be covered by Article 3(1)(g). Conversely, France did notify the application of their holiday funds under Article 3(10), believing them to be covered by that provision rather than Article 3(1)(b).⁴⁸ Accordingly, a first step in the evaluation of the effectiveness and adequacy of Article 3(10) in ensuring fundamental interests of the Member States would be to clarify the scope of application of the heads of protection mentioned in Article 3(1) (recommendation 22).

The possibility to use one of the heads of protection in Article 3(1) does not seem to be available for collective labour rights, such as the right to organize, the right to strike and the right to co-determination. Unsurprisingly the Member States with a more autonomous system of labour law (UK, SW, DK) all consider these collective rights to be part of their public policy, although only Sweden has notified this as such to the EC. Member States are called upon to be more specific in the legal base they use to apply national provisions and to identify more clearly the application of any labour protection they consider not to be covered by the heads of protection mentioned in Article 3(1). This will help to identify any problematic areas in application of Article 3(10) (recommendation 23, Chapter 5).

Finally, the concept of public policy is used both in the context of the free movement of services and in the context of private international law. It is currently unclear whether the concept of public policy used in the case law on free movement of services is also valid in the context of the Rome I Regulation and if not, what impact the PIL concept may have on the interpretation of the PWD. Further clarification on this point would be welcomed (recommendation 24, Chapter 5).⁴⁹

⁴⁷ Section 5.3 ‘Temporary Work Agencies’ p. 185-186.

⁴⁸ More examples can be found in section 3.7 p. 89-90.

⁴⁹ Section 5.4 ‘Extension of protection under Article 3(10),’ p. 196-197.

In the *Commission v. Luxembourg* judgment the ECJ made it clear that the notion of public policy has to be interpreted restrictively. This has encouraged several Member States to re-evaluate their systems (e.g. LUX, DK, SW) in order to check for inconsistencies. Nevertheless, implementations which appear to be inconsistent with the restrictive wording of Article 3(10) can still be found in several Member States, including UK, IT and BE. In practice in those countries the overextensive application of national law is mitigated by a more restrictive enforcement practice, but this does not remedy the problem of incompatibility with EU law.

4. Enforcing rights conveyed by the PWD

Chapter 4 deals with problems in monitoring and enforcing rights conveyed by the PWD. Posted workers encounter difficulties and obstacles when they intend to enforce the rights that stem from the Directive. The same holds for monitoring authorities in the host Member States when they control compliance with working conditions under Article 3 (1) of the PWD and its enforcement in practice.

The chapter first introduces the different actors involved in enforcement – workers and/or their representatives, national authorities. A distinction is drawn between authorities that monitor compliance with the rights guaranteed by the Directive and authorities that monitor the presence of posted workers within the territory. The information responsibilities of the monitoring actors towards the general public and the information requirements they impose on service providers and other actors involved are subsequently examined. Another part of the comparative analysis concerns the inspection and enforcement activities of the monitoring actors in practice. This deals with the frequency of workplace control, the way labour inspectorates and other inspectorates assess self-employed persons rendering services in the receiving Member State, and how they verify whether an undertaking is properly established in the country of origin. The extent to which cross-border cooperation occurs and the recognition of foreign penalties/judgments is also examined.

Besides this, specific attention is paid to possible legal or self-regulatory preventive and/or repressive tools used to further compliance and enforcement. In particular this concerns joint and several liability of recipients (clients/main contractors/user companies) of a service carried out by posted workers, in order to prevent the non-payment of wages, social security contributions and fiscal charges by their employer. The legal remedies available to posted workers and their representatives are also examined, as well as any other means of support for posted workers.

The findings in the national reports that are summarized and analyzed in Chapter 4 clearly reveal and expose the weaknesses in the national systems of labour law and their enforcement with regard to vulnerable groups on the labour market, such as (certain groups of) posted workers. Compliance can and should therefore be strengthened by the implementation and application of several monitoring and enforcement ‘tools’, listed below.⁵⁰ But at what level should this be done?

In contrast to the provisions in the PWD with regard to the personal and substantive scope of the Directive, the PWD does not contain any guidance or minimum requirements with regard to the level/character of monitoring and enforcement (Article 5). Besides this, only very few requirements are laid down with regard to the provision and exchange of information (Article 4) and legal remedies for posted workers and/or their representatives (Article 6). Thus, at the time of writing, the monitoring and enforcement of the PWD will in principle be largely (if not entirely) based on the level provided for in the domestic system. In general, compliance with EU law is based on a decentralized system of enforcement, which means that EU law is predominantly applied by the national authorities and adjudicated by the national courts according to the national (procedural) rules. However, this does not

⁵⁰ For more details see Chapter 5.5, p. 198 - 203 and 5.6, p. 204 – 213.

(necessarily) mean that the responsibility of the Member States to guarantee compliance with EU law should stop when the limits of their own system are reached. In fact, as may be gathered from the case law of the ECJ, the Member States have a responsibility to guarantee the ‘effet utile’ of EU law. This is based on the so-called principle of effectiveness grounded in Article 4(3) sentences 2 and 3 of the TEU (old Art. 10 EC). In line with this principle, Member States need to implement, apply and enforce effective, proportionate and dissuasive sanctions to guarantee compliance with EU rules, such as the PWD. Therefore, the current situation where the weaknesses in the national systems of enforcement are also the weaknesses of EU law on posting of workers does not have to be accepted as a ‘fait accompli’ but, as far as feasible, may and should be reversed.

In this regard, some help at European level would seem indispensable. Preferably, national tools and rules on enforcement should be embedded in a European framework of legislation and cooperation between the main actors involved, to achieve an effective level of compliance with the PWD on the one hand and to prevent unfair competition and legal confusion hampering the cross-border provision of services on the other.

Actors involved

Monitoring the terms and working conditions (i.e. the rights) of posted workers

The overview of national actors involved in monitoring and enforcement displays a rather differentiated picture, which may be assessed as less than ideal from the point of view of enhancing the free provision of services and from the point of view of the other aims of the Directive, viz., the protection of the posted workers and the need to sustain fair competition. Those situations where multiple authorities are involved (Belgium, Italy, Germany), or (officially) no authority at all (UK), may be assessed as especially problematic. Moreover, the extent to which public authorities are involved in monitoring/enforcement of labour law varies, too. In this respect, the vulnerability of systems that place excessive reliance on private law enforcement is revealed (once again), since it may lead to (abusive) situations of non-compliance where unreliable service providers are involved (SW, DK, NL, UK in general, and DE specifically with regard to health & safety law).

However, this situation reflects the choice in the PWD to leave monitoring and enforcement of the rights conveyed in the Directive fully to the national level (see Article 5 PWD), without any detailed requirements or guidelines (of minimum harmonization) as to the appointment of certain responsible actors and their tasks. In that sense, the problem is caused not by one factor alone, but instead by the ‘silence’ at EU level combined with the application/enforcement of the PWD at national level. Nevertheless, the fact that the Directive is not more explicit or even silent, does not imply that Member States should not respect prevailing EU law as interpreted by the Court while applying national monitoring and enforcement instruments/systems.

In this regard, it is recommended to create greater transparency in the monitoring systems of the countries with multiple authorities involved by appointing one authority as the first contact point. In addition, the implementation of more public enforcement measures is advocated in respect of countries where the national system insufficiently ensures the adequate enforcement of posted workers’ rights. Insofar as

both problems would endanger the ‘effet utile’ of the PWD, such measures may be stipulated at EU level (recommendations 25 and 26).

Another problem concerns the mode of operation of the monitoring authorities. In Germany, customs authorities specifically control compliance with and enforcement of (part of the applicable) regulations on the posting of workers. At regional level there are 40 main customs offices (Hauptzollämter) which are competent to do so. In contrast, in all the other host countries it seems that the inspectorates focus first and foremost on monitoring compliance with national labour law in general. Thus, no enforcement capacity is specifically allocated to monitor compliance with the rights conveyed in the PWD. As a result, inspecting bodies act within their ordinary prerogatives, which means in practice that they essentially interpret existing national labour law following both “local practices” and domestic policy guidelines, with only a limited awareness of the *presence* and specific legal situation of posted workers. Hence, a more targeted focus on this group would seem to be necessary in the monitoring and enforcement policy of national authorities. This can be achieved by appointing a taskforce and/or issuing inspection guidelines specifically targeted at posting of workers situations (recommendations 27 and 28).

Monitoring the presence of posted workers

Monitoring the presence of posted workers entails a more ‘migrant law’-style of supervision (namely regarding access to the territory of a state). In this context, specific monitoring and enforcement tools targeted at the posting of workers do exist in several Member States. The existence in all Member States included in this study of requirements to notify to the relevant national social security authorities the posting of workers for social security purposes (E-101 forms, based on Reg. 1408/71 (now Reg. 883/2004)) or to register for tax purposes was mentioned. However, in this study we restrict ourselves only to such (equivalent) requirements related to the posting of workers within the meaning of the PWD (i.e., on monitoring the presence of posted workers for the purpose of checking the respect of the relevant, applicable labour law provisions).⁵¹ In this respect we found that no authority monitors the presence of posted workers in general in Sweden, Italy, the Netherlands and the UK. In these countries, no government agencies notify posted workers and gather information relating to the number of workers posted to their territories in the meaning of the PWD. However, IT, NL and UK run permit or visa requirement schemes for (some) posted workers who are third country nationals (so for migration law and/or transitional regime purposes). As already stated above in the section on ‘transitional regimes’, such schemes may cause problems of compatibility with EU law (be disproportionate).⁵²

In this context, the question whether a requirement on service providers to simply notify the presence of posted workers may be justified and proportionate as a

⁵¹ The definition of ‘posted worker’ for social security and tax law purposes is not fully equivalent with that of the PWD. Thus, the monitoring activities do not fully overlap as well. It would require a different (but recommended) study to look at monitoring of posted workers from a comprehensive approach (including all relevant legal disciplines). See Chapter 4, p. 101-104.

⁵² See p. 14-15 of this executive summary. See in particular the VanderElst (C-43/93), Commission-Luxembourg (C-445/03), Commission v Austria (C-168/04) and Commission v Germany cases (C-244/04) and the Vicoplus cases (C-307-309/09).

precondition for monitoring the rights of posted workers, merits further study (recommendation 27). Belgium, Denmark, France, Germany, and Luxembourg do run general notification or 'pre-declaration' schemes for posted workers, regardless of their nationality and their specific posting situation.

Notification duties from a sending country perspective

With regard to the predominantly sending countries Estonia, Romania, Poland and also other major sending countries (DE, BE, NL, FR), we looked at the notification requirements that exist for workers posted *from* their territories: in all countries only the duties pursuant to Reg. 1408/71 / Reg 883/2004 apply. Pursuant to this Regulation, the responsible authorities register posted workers sent to another Member State by issuing E-101 forms to employers. The role of the (old) E-101 form (now A1 form) is to indicate the applicable legislation for establishing the social security rights of migrant workers, employees and the self-employed as well as where the respective contributions should be paid. The information in the E-101(A1) form reflects relevant information for establishing the social security rights⁵³ but does not reflect the salary level or working conditions.

Involvement of social partners and other actors

With the exception of health & safety legislation, monitoring of compliance with other acts of labour legislation, let alone collective agreements, has never been a task for public actors in Denmark and Sweden. This is left to the social partners and, in (the few) branches of industry without organized social partners, to individual workers. Hence, the Danish and Swedish trade unions are (in practice) the only actors to monitor compliance with the rules, apart from that on working environment health and safety. In both the Danish and Swedish situations doubts were raised about the possibility for the trade unions to effectively monitor all posted workers. The trade unions do not have adequate resources to do so. Moreover, the trade unions' capacity to monitor that posted workers are not deprived of their rights depends on whether or not their employer, or at least the main contractor, is bound by a CLA. Without a collective agreement, the trade unions have no means to exert pressure on the employer to account for pay rates etc.

Apart from the Nordic countries Denmark and Sweden, social partners are involved in monitoring/enforcing the rights of posted workers and their presence only to a (very) minor extent. If trade unions discover irregularities, they can take initiatives within their power, such as mediation and regularization of the situation or (spontaneous) collective action; or they can report the situation to the responsible national inspectorates, which may then investigate further. In all countries it was observed that social partners lack sufficient (financial) sources and access to data needed for the adequate performance of their tasks. Most national authorities do not feel (especially) responsible for monitoring compliance with labour law at CLA level, nor do they cooperate very smoothly with social partners. This situation leads to a clear absence of monitoring and the enforcement of rights at the CLA level. As far as the possible recourse to collective actions is used as an enforcement strategy, it is worth noting that in the UK the trade unions used to depend fully on their collective action power

⁵³ Sickness benefits, maternity and paternity leave, retirement, invalidity, work accidents, professional diseases, unemployment, and family allowances.

(quite similar to the Nordic countries). After the Viking and Laval rulings, however, they now feel severely restricted in their realm.

In conclusion, more financial as well as institutional support of social partners is needed at national level. Besides this, it would be helpful to stipulate minimum standards, preferably at EU level, for adequate monitoring/enforcement of rights at the CLA level, as well as guidelines for cooperation between the authorities and social partners (recommendation 31). In this regard, countries may also learn from each others' 'best practices', such as the requirement in Estonia for a supervisory authority to reply to a written appeal from a trade union concerning violations of labour law no later than within two weeks. Other inspiring practices may be found in the Italian report on (support for) local trade union initiatives and the Dutch report on 'compliance offices' set up by social partners to monitor compliance with their branch CLA.⁵⁴

Other actors involved

In Germany, at undertaking level, the works councils are obliged to supervise compliance with the generally binding collective agreements containing minimum employment conditions in line with the German implementation Act AEntG.⁵⁵

In the United Kingdom the role of ACAS (Advisory, Conciliation and Arbitration Service) is worth mentioning. ACAS is a statutory agency, nowadays governed by the Trade Union and Labour Relations (Consolidation) Act 1992, which imposes a general duty on the service to 'promote the improvement of industrial relations'. It has powers to intervene in trade disputes by way of conciliation and arbitration, which it used in the Lindsey Oil Refinery case.⁵⁶

Information responsibilities

Identification and dissemination of information

According to Article 4(3) of the Directive, monitoring authorities have responsibilities to provide information to the general public on posted workers' rights laid down in law and (generally binding) CLAs. In practice, the dissemination of information by the responsible authorities focuses on the statutory rights only. The social partners – in practice mostly the trade unions – are involved in offering information about the applicable CLA provisions. In practice, this division of responsibilities leads to a paucity of information on the entitlements of posted workers at CLA level. Only in Denmark, the Netherlands and Sweden have initiatives been taken to identify the applicable rules regarding the hard nucleus listed in Art. 3(1) PWD at CLA level and subsequently to make this information available to the public.

In all countries examined, except Italy, websites are the most prominent means for the dissemination of information, followed by information on paper, single points of contact (linked to the implementation of the Services Directive (Dir. 2006/123) and special information campaigns. Especially in regard to information in a plurality of

⁵⁴ See section 4.2 under social partners' involvement, p. 97-99.

⁵⁵ See section 4.2, p. 100.

⁵⁶ See section 4.2, p. 100.

languages and the accessibility of the information, the situation has visibly improved in comparison to four years ago, when the European Commission in its Communication 159 (2006) concluded that there was a major scope for improvement. Nevertheless, further efforts to enhance accessibility, sufficiently precise and up-to-date information remain necessary, particular in Italy but also at EU level (EU fiches) (see recommendation 33).

Another point of attention concerns the amount of information available: too many sources of information may also endanger transparency. In this regard it is recommended that authorities designate one website/webgate as the central entry point for the provision of information, at both European and national level (recommendation 34).

A welcome best practice was the recent initiative of the European Federation of Building and Woodworkers (EFBWW) and the European Construction Industry Federation (FIEC), which launched an internet portal with information on the working conditions applicable to posted workers in the construction industry. Also worth mentioning is the reference in the Estonian report to the website of EURES as a source for informing posted workers on applicable protection in the country of destination.

Special projects

As reported by the national experts, it should be noted that posted workers, in particular in the lower segments of the labour market, may not have internet access.⁵⁷ This makes adequate information on paper and special information and awareness-raising campaigns focused on posted workers indispensable (recommendation 35). Examples were given in some country reports of special activities of the trade unions, such as a volunteer project focusing on language groups among posted workers (BE), the publication of a paper newsletter on the applicable law in five languages, and temporary projects called “Poolshoogte” (BE) and ‘Kollega’ (NL). These initiatives were taken to improve knowledge regarding the functioning of the trade unions, and to respond to the special information needs of Polish workers and for recruitment purposes. However, such special projects at grassroots level are costly and time-consuming. To promote and sustain these initiatives, financial support and facilitation at EU and national level is an absolute prerequisite.

Dissemination of information in the sending state

Currently, not much is done at national level to make information on terms and working conditions in host states available in the workers’ country of origin before they are posted. In this respect, the recent initiatives of host states to target information at workers and firms in the sending countries (through their embassies, for example) deserve following, since awareness raising should start as early as possible in order to enable the worker to make an informed decision on the posting. To further this goal, the authorities in sending countries should also be addressed. Pursuant to Article 4 of Directive 91/533, employers have a duty (in addition to the obligation stemming from Article 2 to notify an employee in writing of the essential aspects of the contract or employment relationship including level of remuneration – basic amount and other components, paid leave, length of the working week, applicable CLA) to inform a worker who will be posted longer than one month before

⁵⁷ See section 4.3, p. 110.

his departure about at least: (a) the duration of the employment abroad; (b) the currency to be used for the payment of remuneration; (c) where appropriate, the benefits in cash or kind attendant on the employment abroad; and (d) where appropriate, the conditions governing the employee's repatriation.

In the countries covered by this study this obligation seems only to be subject to the supervision of the Labour Inspectorate in its role as a sending state in Estonia. Here, failure by an employer to submit information is punishable by a fine. This good practice deserves to be followed by other Member States in their role as a sending state, to underscore their duty as regards information on constituent elements of posting. At EU level, amending Directive 91/533 is highly recommended, in order to establish an effective and dissuasive sanction in case of non-compliance with the obligations laid down in Article 2 and 4 of this Directive and to extend its scope to all situations of posting covered by the PWD, regardless of the intended duration of the posting. Additionally, the service provider may be obliged to submit his written statements to his employees in accordance with Directive 91/533 also to the competent national authorities in the host and/or sending state.⁵⁸ In case authorities in the latter state would be made primarily responsible, the cooperation with the competent authorities in the host state should be clearly established (recommendation 36).

Inspection and enforcement activities

Domestic and cross-border cooperation

Despite considerable progress, the internal cooperation between national authorities (including social partners) responsible for monitoring the position under labour law, social security law and tax law of posted workers and their employers, still displays serious shortcomings: while in some Member States there is still no or only limited systematic cooperation, in others there is a clear gap between cooperation on paper and cooperation in practice. The same holds for cross-border cooperation of the national authorities involved in PWD-related monitoring/enforcement issues. The difficulties in cross-border cooperation are increased by the wide variety of functions performed by the competent authorities in the different countries (what the Labour Inspectorate does in one country falls under the competence of Tax authorities, or the Ministry of Finance in another). Hence, further implementation/application of the ongoing initiatives at EU and national level is necessary with regard to the enhancement of both domestic and (bilateral) cross-border cooperation between inspectorates⁵⁹ (recommendation 29).

Several countries reported a shortage of staff involved in monitoring and enforcement tasks, which may have adverse effects on the frequency of controls. In order to meet

⁵⁸ An obligation to submit conformal certificates to the directive 91/533 EC, or the written working contracts (copies are sufficient) of the posted workers currently exists in Luxembourg and Germany (as host states). See Chapter 4.3, p. 114.

⁵⁹ See in this respect Commission's Recommendation of 3 April 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services and Commission's communications COM (2006) 159 final 4th April 2006 and COM (2007)304 final, 13 June 2007. See Chapter 4.6, p. 154-169 for more details on cooperation in and between the Member States.

or sustain a satisfactory level of effective, proportionate and dissuasive enforcement, these shortcomings could be ameliorated by national efforts (by recruiting more qualified inspectors and setting targets for a certain number of inspections, based on risk assessment) and/or at EU level by stipulating appropriate minimum standards in a legal instrument. The advantage of an EU-level measure would be that it may reduce, as far as possible, the huge differences between the Member States in the level of enforcement of the rights conveyed in the PWD (recommendation 30).

Assessment of the worker's status

A specific problem related to monitoring the terms and working conditions of posted workers is the difficulty which is sometimes experienced by authorities of distinguishing between a (posted) worker and a self-employed person (service provider). This may be problematic even in purely national situations, but in cross-border situations the problems are even worse, since different legal regimes may apply to those categories. With regard to the applicable social security system, the Member State in whose territory the person concerned is normally (self-)employed is responsible for (issuing the E 101 certificate) determining the nature of the work in question. Consequently, in so far as an E 101 certificate establishes a presumption that the self-employed person concerned is properly affiliated to the social security system of the sending State, it is binding on the competent institution of the host state.⁶⁰ In the context of the PWD it works the other way around: Article 2(2) PWD stipulates that the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted. Hence, the nature of the work in question should be determined in accordance with the law of the host state.

For labour law purposes, Dutch law provides a rebuttable legal presumption of an employment relationship. This good practice may inspire other Member States to implement similar provisions. It must be noted though that a similar (albeit more stringent) legal presumption in French law was considered to constitute a disproportionate restriction of the free movement of services incompatible with EU law.⁶¹ Even if this judgment would make Member States hesitant to adopt a legal presumption of an employment relationship in certain situations of posting, the European legislator could still consider this option. This again highlights the problems Member States experience in effectively monitoring the proper application of the Directive without violating EU law.

Recognition and execution of foreign judgments and decisions

Despite EU measures governing the recognition and execution of foreign judgments and decisions, enforcement of rights conveyed by the PWD still seems to stop at the national frontier. In part this is due to legal lacunae and to this extent additional measures should be taken at national (e.g. in France) and perhaps also at EU level to enhance the cross-border recognition and execution of penalties used in the context of the PWD (recommendation 32). The agreement concerning mutual administrative and legal assistance in administrative matters between Germany and Austria of 31 May 1988 may be mentioned as a best practice. This does make cross-border enforcement of administrative sanctions possible.

⁶⁰ Case C-202/97 (Fitzwilliam Executive Search), para 53, Case C-178/97 (Banks), para 40.

⁶¹ As interpreted by the ECJ in the context of Regulation 1408/71 (now Reg. 883/04). See Case C-255/04, Commission v. France [2006] ECR-I 5251, para. 48-49. See also Chapter 4, p. 157-158 and Chapter 5, p. 202 – 203.

Information duties on service providers

In accordance with Article 5 PWD, national authorities of the host state may impose information duties on service providers and others, such as the service recipient and/or the posted worker. We have examined statutory and self-regulatory duties on service providers and duties imposed on other actors. However, we refrained from describing possible requirements to submit information on the posting of workers in the host country only for social security and tax purposes,⁶² as well as for the single purpose of monitoring posted workers with a third country nationality (as in NL partly, and fully in IT, UK).⁶³

Notification requirements

In five of the nine hosting states covered by this study (BE, DK, FR, DE, LUX), notification requirements are imposed on foreign service providers posting workers to enable the responsible government agencies to fulfill their monitoring and enforcement tasks. These systems may appear as a good practice in the sense that the introduction of some kind of notification system seems to be a precondition for monitoring and enforcing the national implementation laws of the PWD. However, this does not mean that it is an infallible instrument; first of all notification requirements may cause problems of compatibility with EU law (i.e. be disproportionate); secondly, many national stakeholders point to the problem that many service providers ‘forget’ to notify. Nevertheless, all stakeholders interviewed for this study seem convinced of the advantages of this instrument both for enforcement purposes and for policy purposes. Indeed, effective policy making is impossible when no reliable data exist about the size and character of the phenomenon of posting in the framework of the PWD. When a user-friendly and readily accessible system of notification for posting of workers is implemented, as in Belgium, the advantages seem to outweigh the disadvantages. The notification systems in Belgium and Denmark, as applied to posting, may also be labeled good practices in respect of the exemptions they contain for insignificant and specific postings as well as (BE) exemptions from more far-reaching information requirements.⁶⁴ Such tools may act as an incentive for service providers to notify. The requirement in Germany and Luxembourg to submit the documents service providers have to provide to their employees pursuant to Directive 91/533 and (LUX), and the possibility for ‘repeat players’ to submit only a ‘light declaration’ may also be classified as good practice, subject to further assessment in the light of the case law of the ECJ.

In this respect, the development at EU level of uniform documents related to certain information requirements may be feasible (or insisting on multipurpose use of the documents required in Art. 2 and Art. 4 of Dir. 91/533). Besides this, the differences between Member States with and without notification systems and also the different

⁶² The definition of ‘posted worker’ for social security and tax law purposes is not fully equivalent with that of the PWD. Thus, the monitoring activities do not fully overlap as well. It would require a different (but recommended) study to look at monitoring of posted workers from a comprehensive approach (including all relevant legal disciplines).

⁶³ Information requirements with the single purpose of monitoring posted workers with a third country nationality presence of posted workers are part of national migration law rather than of national labour law and therefore not relevant for the monitoring and enforcement of the PWD as such.

⁶⁴ Please note that this qualification of the Belgium system as a best practice is restricted to the notification with respect to posting of workers. See pending ECJ case 577/10 as regards the compatibility with Article 56 TFEU of the same registration/notification as applied to self-employed.

content of notification requirements in force, may create confusion and uncertainty. Whether it would therefore be recommendable to coordinate a notification system at EU level by laying down at least the minimum and maximum requirements of such a system merits further study, notably with regard to the effectiveness and proportionality of such a tool, as well as its implications from an administrative burden point of view. Inspiration may be drawn from Directive 2009/52 and from the old proposals to adopt a residence Directive for posted workers (recommendations 37 and 38).⁶⁵

Additional information requirements

Differing situations in the Member States also exist with regard to additional requirements, such as the need to request prior authorization or to keep employment documents available for the authorities, or to appoint a representative which may in certain cases be in breach of EU law.⁶⁶ In this regard Member States should exchange best practices with regard to ‘balanced’⁶⁷ additional duties on service providers. At EU-level uniform documents with regard to information duties on service providers should be developed (or to insist on multipurpose use of the written statements required in Art. 2 and Art. 4 of Dir. 91/533) (recommendation 39).

A number of differences also exist between the Member States on the severity and content of penalties and fines. In this respect it was (roughly) assessed that Luxembourg seems to have the best balanced penalties, as regards proportionality on the one hand and dissuasiveness (or even business friendliness) on the other. Here, no administrative fines are imposed but rather a lot of compliance orders. Another advantage of this mode of sanctioning is that it avoids a lack of result ‘at the end of the day’, as was noted in some other Member States (Belgium, France, Italy), where predominantly criminal penalties exist. In such systems a statement of offence will not necessarily lead to prosecution, since the prosecutor often does not seem to afford priority to offences regarding the posting of workers

Self-regulatory information duties on service providers

In some Member States (Denmark, Italy, the UK), collective agreements contain duties on foreign service providers to provide pay receipts and employment contracts or documentation of the terms of employment upon request by the local branch of the trade union. Such initiatives may, self-evidently to the extent that the content of the CLA measures is not disproportionate or in breach with EU law (i.e. not too rigid and not too loose), be welcomed and exchanged as good practice as a tool to enhance compliance with the PWD at the CLA level (recommendation 40).

Complaint mechanisms for service providers

Foreign service providers may contact the national contact points of the Internal Market Problem Solving Network (SOLVIT) with complaints about the authorities’ application and enforcement of the rules on posting of workers. It seems, especially in Poland, that this complaint mechanism has worked satisfactorily, but in the majority of Member States covered by this study it was found that the mechanism is not very well known and may be underused. Apart from that, it proved very difficult in several Member States to access information about the nature of complaints from the SOLVIT agencies.

⁶⁵ See COM (1999) 3 and COM (2000) 271.

⁶⁶ See Chapter 4, p. 117-123, also with regard to the SOLVIT complaints, p. 151 – 153.

⁶⁷ Between excessively rigid (disproportionate) and overly loose (not dissuasive or deterrent) rules.

Duties on the service recipient

Information duties imposed on recipients of services

In some countries (Belgium, Denmark in respect of certain risk sectors), recipients of the service have to check whether foreign service providers, notably in their role as foreign subcontractor(s)/temporary staff agency, have complied with their notification duties. In case of non-compliance, the recipient/user undertaking has to report this to the competent national agency. If the service recipient reports the non-compliance, he is freed from liability, but may be fined otherwise. Some duties of information on the recipient of the service are also in place at CLA level, notably in the construction sector, stemming e.g. from the implementation of Directive 92/57/EEC on minimum safety on building sites. Given the problem of non-notifying service providers witnessed in several Member States, it is understandable that the service recipient is made co-responsible to a certain extent. Thus, to enhance the effectiveness of notification schemes, these initiatives may be welcomed and exchanged as good practice, namely as a tool to enhance compliance with the PWD, including the CLA level. Nevertheless, the compatibility with EU law notably with regard to the effectiveness and proportionality of such a tool and the implications from an administrative burden point of view merit to be further examined.

Liability of the service recipient (or 'functional equivalents')

In five of the nine host countries in our study (Belgium, France, Germany, Italy, the Netherlands) legal and sometimes also self-regulatory mechanisms of ultimate liability are in place, in particular joint and several liability schemes to prevent the non-payment of wages (all but Belgium), social security contributions (all) and fiscal charges (Belgium, France, the Netherlands and partly Denmark).

In some countries several tools have been developed either to prevent the possibility of liability among the relevant parties or to sanction those parties that do not follow the rules. The preventive tools may be aimed at checking the general reliability of the subcontracting party and/or to guarantee the payment of wages, social security contributions and wage tax. Parties that do not abide by the rules of the available liability arrangements may be sanctioned through a number of *repressive tools*, namely: back-payment obligations (Denmark, France, Italy, the Netherlands), fines (Belgium, Denmark, France), and/or alternative or additional penalties (Germany, France, Italy). In other host states (notably Sweden, Luxembourg, and in a way also the UK) alternative measures (functional equivalents) aimed at the same objectives are in place.

For an extensive description of the liability systems in the five countries mentioned, we refer to the study on 'Liability in subcontracting processes in the European construction sector' published by the European Foundation for the Improvement of Living and Working Conditions (Dublin Foundation) in 2008. One of the findings of this study was that the liability rules in the Member States under study largely fail to have an effective impact on fraudulent situations and abuses of posted workers in cross-border situations of subcontracting and temporary agency work.

Whether it would be feasible to adopt minimum standards at EU level on duties (including liability) of service recipients in the context of the PWD merits further

study, notably with regard to functional equivalents in place in Member States not covered by this study, and the effectiveness of these tools (recommendation 41).

Supportive tools/remedies available to posted workers

Under this heading we first of all examined the legal remedies for posted workers and/or their representatives to enforce the rights conveyed by the PWD. Article 6 of the PWD stipulates that in order to enforce his rights to the terms and conditions of employment guaranteed in Article 3 of the PWD, the posted worker must have the opportunity to institute judicial proceedings in the host Member State, without prejudice, where applicable, to the right, under existing international conventions/regulations on jurisdiction, to institute proceedings in another State, such as the one where he habitually fulfills his employment contract. Hence, all Member States have had to ensure that workers posted to their country, covered by the Directive, can bring judicial proceedings for enforcement in the territory where they have been posted. With the exception of the UK, Article 6 of the PWD is explicitly implemented in all Member States covered by this study. In the UK the posting situations covered and the rights derived from the PWD have not been clearly defined in national law and the jurisdiction clause in Article 6 of the Directive was therefore not properly implemented. Nevertheless, EU workers⁶⁸ posted in the UK can bring a claim before the Employment Tribunal for, for example, unfair dismissal, non-payment of the minimum wage or disability discrimination, as they have the same protection as non-posted workers in the UK.⁶⁹

Locus standi for social partners and individual posted workers

Several Member States (Belgium, France, the Netherlands) not only implemented the jurisdiction clause with regard to the individual posted worker, but also *independent of the individual worker*, for representative workers' and employers' organizations, without prejudice to the right of a posted worker to take legal action himself, and to join or intervene in legal action. Since trade unions (and employers' associations) in the host state may have an independent interest in enforcing host law labour standards on foreign service providers, this may be classified a good practice which deserves following by other Member States. At EU level, we favour an amendment of Article 6 PWD to make the option to give social partners locus standi an obligation. Besides this, the wording of Article 6 PWD must also stress that Member States are obliged to give individual posted workers locus standi before the courts in the host state. Currently, this is not the case in Sweden.

In this context the independent right to bring cases before the court and its rather effective and frequent use in practice by the German holiday fund ULAK also merits attention. If not already provided for, Member States may consider the possibility and added value of enabling a competent actor/authority to bring proceedings against a non-abiding employer (for purposes such as recovering outstanding wages) (recommendation 42).

⁶⁸ It is not clear whether this implies the exception of workers with a third country nationality.

⁶⁹ See: <http://www.thompsons.law.co.uk/text/10640005.htm>

Access to legal aid for posted workers

Posted workers (although not domiciled or resident in the host state) have equal access to the legal aid mechanisms provided by law in Belgium, France, Germany, the Netherlands, Luxembourg and Sweden, as long as they are EU nationals or regularly reside or are domiciled in another Member State of the EU (except for Denmark). However, in accordance with the general principles operating in the UK in employment cases, no legal aid would be available for posted workers there. Nor do workers posted to Romania have access to legal aid, with the exception of the legal aid that may be provided by the trade union. Although these findings are in line with EU law (notably the legal aid directive) it may be recommended, for instance by an EU Communication, to provide access to legal aid for (posted) workers in countries where this is currently not available (recommendation 43).

Non-use of jurisdiction clause by posted workers

In all the receiving Member States it seems that the right to take legal action has at present hardly been or has even never been used by posted workers nor by their representatives (with the possible exception of Germany, compare Annex II and III). Set against the convincing (albeit anecdotal) evidence of (abusive) cases of non-compliance as reported in the national reports (see section 3.5 and Annex I), this must be interpreted as a clear signal that the jurisdiction clause in the PWD on its own is not enough to provide an effective remedy. As several national reports concluded, most individual posted workers in practice only seem to stand up for their rights if they do not have any other choice. This applies to cases of severe occupational accidents (which may also stir surviving relatives and/or shocked colleagues to undertake action) or if no wage at all is paid and the employees cannot even pay their cost of living. In the latter cases the direct employer may often have vanished and is untraceable.

The main causes for this passive and non-assertive attitude of posted workers are to be found in their often vulnerable or specific socioeconomic and societal position. Hence, the problem is mainly due to other reasons than insufficient implementation, application or enforcement of the PWD at national level, or the PWD as such. This is not to say that nothing should be done from a legal point of view. To the extent that procedural problems are detected (in some national reports), efforts should certainly be made to remove them. However, the main point to underscore in this context is the indispensable role of trade unions which, as was shown in sections 3.2 and 4.5, try to reach and 'empower' posted workers, together with other actors at grassroots level. Several accounts of both wild cat strikes and organized strikes on behalf of posted workers are worth noting. At the same time, it was found that efforts to unionize posted workers are not very successful, mainly for non-legal reasons (disinterest / fear / distrust in unions because of bad experience / image in country of origin, costs of membership). Nevertheless, there are also signs of success in the growing awareness of primarily Polish posted workers, which indicates that trade union efforts should be sustained and not abandoned due to a lack of financial resources (as several reports also noted). Therefore, we believe it is important to emphasize the long-term need to structurally promote and support trade union (and/or social partner) initiatives in this regard (recommendation 44).

Complaint mechanisms

None of the countries examined have specific complaint mechanisms for posted workers to lodge complaints about non-compliance with the PWD. Posted workers can make use of the same methods of complaint as any other worker in these countries, such as contacting the trade unions or the labour inspection services with their complaints. However, these complaint mechanisms available under the general domestic legislation may generally not be considered understandable by or accessible to posted workers (nevertheless, the role of ACAS in the *collective* Lindsey Oil Refinery dispute must not be underestimated). Hence, in practice most posted workers do not complain about non-compliance and abusive situations, in some instances because they are afraid to do so, because it could cause them to lose their job. It is advised that the lack of designated complaint mechanisms at national level should be remedied. At EU level, too, we recommend to facilitate and/or initiate a complaint mechanism specifically aimed at posted workers (recommendation 45).

5. Final remarks

In this executive summary of our comparative study, based on twelve national reports, we have been able to give only a very brief outline of our extensive research into the existing problems in the implementation, application and enforcement of the Directive (see Chapters 2, 3 and 4). However, we have been able to incorporate in this summary most of the analysis of the causes of the problems, as well as our main recommendations, including the classification of best practices (see Chapter 5).

In general, many of our recommendations boil down to clarification and a more precise application of the concepts and standards in the PWD to enhance the Directive's practical impact. Ideally, the clarification must occur mainly at EU level, with the more precise and accurate application at national level. In particular, where problems of application and enforcement of the PWD are concerned, we also advocate the development of new legal or policy instruments. A lot can be done at national level, but with an eye to the principle of effectiveness grounded in the TEU, (additional) legal action at European level would seem to be indispensable.

Étude comparative des aspects juridiques concernant le détachement des travailleurs dans le cadre des prestations de services dans l'Union européenne

à la Commission européenne
(N° de Contrat VC/2009/0541)

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DOCUMENT DE SYNTHÈSE

1. Contexte et question traitée

Depuis assez longtemps déjà, la position de travailleurs détachés dans un autre État membre, dans le cadre de la prestation de services, est un sujet qui intéresse l'Europe. La Directive concernant le détachement de travailleurs (ci-après nommée DTD), entrée en vigueur depuis le 16 décembre 1996, est l'un des résultats concrets répondant à cette inquiétude. La DTD vise à concilier l'exercice de la liberté fondamentale des entreprises de fournir des services transfrontaliers conformément à l'Article 56 du traité de Rome (ex Article Traité CE) et la nécessité de créer un climat de concurrence loyale et de respect des droits des travailleurs (paragraphe 5 du préambule).

La Commission Européenne a régulièrement contrôlé la mise en œuvre et l'application de la Directive, afin de vérifier si les objectifs de la DTD étaient atteints. En 2006¹, un contrôle global, à l'initiative de la Commission Européenne, a donné lieu à la conclusion qu'un éventail de problèmes portant sur la mise en œuvre, l'application et l'exécution de la Directive dans la pratique sont à la base du défaut principal de la Directive, voire de tous ses défauts.

En juillet 2009 la Commission Européenne a lancé un projet pilote « conditions de travail et de vie de travailleurs détachés ». Deux projets de recherche ont été ordonnés dans le cadre de ce projet et ont été lancés en décembre 2009/janvier 2010. L'un porte sur les effets économiques et sociaux du phénomène du détachement de travailleurs dans l'Union Européenne (VT/2009/62). L'autre (VT/2009/63) porte sur les aspects juridiques du détachement de travailleurs dans le cadre de prestation de services dans l'Union Européenne. La présente étude en est le résultat.

Objectifs, méthode et limitations de la présente étude

Remarques générales

Cette étude comparative est fondée sur 12 études nationales ² ayant trait aux questions et difficultés concernant l'application pratique de la législation relative au détachement de travailleurs, ainsi que son exécution dans la pratique. À cet égard l'étude n'étudie pas seulement ce que font les autorités des États membres (principalement les inspections du travail) pour faire valoir la Directive de manière adéquate, mais se penche aussi sur les activités pertinentes des partenaires sociaux. À cette fin, les rapporteurs nationaux ont organisé des entretiens structurés et étudié la législation et la jurisprudence. Pour les rapporteurs nationaux, un questionnaire détaillé rédigé par les chercheurs de premier plan en étroite coopération avec la

¹ COM (2006) 159 et le Document de Travail des Services de la Commission SEC (2006) 439, ainsi que la communication de suivi COM (2007) 304, « Détachement de travailleurs dans le cadre de la prestation de services : Maximaliser ses avantages et son potentiel en garantissant la protection des travailleurs » et le Document de Travail des Services SEC (2007) 747.

² Les experts nationaux : Belgique : Filip van Overmeiren ; Danemark : Lynn Roseberry ; Estonie : Merle Muda ; France : Barbara Palli ; Allemagne : Monika Schlachter ; Italie : Giovanni Orlandini ; Luxembourg : Guy Castegnaro et Ariane Claverie ; Pays-Bas : Mijke Houwerzijl ; Pologne : Marek Pliszkiwicz ; Roumanie : Christina Maria Ana ; Suède : Kerstin Ahlberg ; Royaume Uni : Keith Ewing.

Commission Européenne et les rapporteurs eux-mêmes, a servi d'outil pour faciliter la tâche.

Bien que la mise en œuvre, l'application et l'exécution de la DTD aient été passées en revue de façon systématique dans tous les pays auxquels a trait la présente étude, il convient de signaler que les résultats de certaines études de pays sont plus fréquemment mis en exergue que d'autres. Ce que l'on peut accorder à deux causes. En premier lieu, comme la DTD s'adresse aux pays dans leur rôle de pays hôte, les pays qui sont principalement des pays d'envoi ont moins d'expérience avec l'application et l'exécution de la Directive. La deuxième raison est liée à la mesure dans laquelle certains systèmes diffèrent des autres quant à la méthode de mise en œuvre, d'application et/ou d'outils de suivi et d'inspection ou quant aux acteurs participant au système d'exécution.

Objectifs

Cette étude vise principalement à atteindre les trois objectifs suivants :

- (1) Fournir un aperçu complet des problèmes relatifs à la mise en œuvre et à l'application de la Directive en pratique ;
- (2) Fournir un aperçu complet des problèmes existants quant à l'exécution des droits des droits instaurés par la Directive ;
- (3) Établir la cause des problèmes identifiés et faire des recommandations quant à leur solution. L'étude vise à établir si les difficultés et problèmes relatifs à la mise en œuvre, l'application et l'exécution de la DTD sont causés par :
 - La méthode nationale de mise en œuvre et/ou l'application nationale de la Directive ;
 - Le système national d'exécution ;
 - La Directive en tant que telle ; et/ou
 - Une coopération transnationale trop faible (voire absente) ;
 - Autres raisons.

Quant au dernier objectif, veuillez noter que cette analyse et ces recommandations représentent les opinions personnelles des auteurs et ne peuvent être considérés comme la position officielle de la Commission Européenne.

Pays choisis

Les cinq arguments suivants ont guidé le choix des pays :

- 1) L'aperçu doit inclure des pays à grande incidence de détachement, tant comme état d'accueil que comme état d'envoi.
- 2) L'aperçu doit englober une gamme de pays à bas salaires et de pays à salaires élevés.
- 3) L'aperçu doit couvrir plusieurs modèles sociaux.
- 4) L'aperçu doit inclure les pays qui ont eu des problèmes particuliers quant au détachement de travailleurs en tant que tel et/ou quant à l'application de la Directive, comme il ressort d'affaires fort médiatisées.
- 5) L'aperçu doit englober des exemples de meilleures pratiques – par exemple dans le domaine de comparabilité de conditions de travail et/ou de coopération entre les parties prenantes concernées.

Les pays qui ont fourni des données pour cette étude comparative comprennent cinq pays qui sont surtout des pays hôte (qui importent des services fournis par des travailleurs détachés), c'est-à-dire « les pays du continent ayant une économie sociale

de marché » l'Italie (IT) et le Luxembourg (LU), les Pays Nordiques le Danemark (DK) et la Suède (SE) et le système anglo-saxon du Royaume Uni (UK). La Belgique (BE), la France (FR), l'Allemagne (DE) et les Pays-Bas (NL) jouent un rôle important comme état d'envoi et comme état d'accueil. Pour avoir une vision globale, trois pays qui sont surtout des pays d'envoi (qui exportent des services effectués par des travailleurs détachés) ont également été étudiés : les pays d'Europe centrale et orientale l'Estonie (EE), la Pologne (PL) et la Roumanie (RO). Cette sélection a permis d'étudier différents systèmes de mise en œuvre et différents modèles sociaux du point de vue de l'état d'accueil et de l'état d'envoi. En outre, les incidents importants et les pratiques pertinentes sont ainsi évoqués des deux points de vue.

Limitation à deux secteurs industriels

Une partie de l'étude se rapporte au droit et à la protection légale. Ceci dépend largement de la législation et des autres règles d'application générale. Néanmoins, la protection par le biais de conventions collectives de travail (ci-après nommées DTD), l'exécution par et la coopération entre les partenaires sociaux et l'application pratique de la Directive, peut s'avérer spécifique selon le secteur. Nous avons choisi le secteur de la construction et le détachement par les entreprises de travail intérimaire. Plusieurs facteurs ont motivé ce choix :

- 1) Ces secteurs ont des caractéristiques particulières quant au détachement ;
- 2) Ces secteurs ont une grande pertinence en pratique ;
- 3) Ces secteurs devraient permettre de fournir une vue d'ensemble des différentes modalités de détachement.

Limitation aux aspects juridiques

La présente étude vise à fournir un aperçu de l'application et de l'exécution de la DTD dans la pratique, mais n'est pas pour autant une étude empirique. Les enseignements sur la performance du système donnés dans cette étude sont basés sur une auto-évaluation par les acteurs nationaux concernés.

Caractéristiques principales de la DTD

Champ d'application personnel de la Directive

La DTD établit, au niveau de la Communauté, un ensemble de règles nationales impératives d'intérêt général pour l'état d'accueil qui doivent être appliquées aux travailleurs détachés. Ce faisant, elle établit un ensemble restrictif clairement défini de modalités et de conditions de travail et d'emploi pour la protection minimale des travailleurs (en vertu de l'Article 3 (1) a - g), que le prestataire de services dans l'État membre d'accueil doit respecter.

La Directive s'applique aux entreprises établies dans un État membre qui, dans le cadre de la prestation de services transnationale, détachent des travailleurs sur le territoire d'un autre État membre (à l'exclusion des entreprises de marine marchande pour ce qui concerne le personnel navigant, voir l'Article 1(2)). En vertu de l'Article 1(3) elle recouvre trois situations de détachement transnational, à savoir :

1. Le détachement dans le cadre d'un contrat conclu entre l'entreprise qui fait le détachement et le destinataire de la prestation de services ;
2. Le détachement dans un établissement ou dans une entreprise appartenant au groupe ;

3. Le détachement fait par une entreprise de travail intérimaire pour les besoins d'une entreprise utilisatrice exerçant son activité dans un État membre autre que celui de l'entreprise d'envoi ;

Avec comme condition, dans les trois cas de figure, qu'il existe une relation de travail entre l'entreprise effectuant le détachement et le travailleur détaché pendant la période de détachement.

Aux fins de la présente Directive, on entend par « travailleur détaché », tout travailleur qui, pendant une période limitée, exécute son travail sur le territoire d'un État membre autre que l'État dans lequel il travaille habituellement (article 2(1)). En outre, la Directive stipule que les entreprises établies dans un État non-membre ne peuvent pas obtenir de traitement plus favorable que les entreprises établies dans un État membre (article 1(4)).³

Champ d'application de fond de la DTD

L'ensemble restrictif des règles à respecter, comme prévu par l'Article 3(1) de la Directive, englobe les domaines de protection suivants :

- (a) les périodes maximales de travail et les périodes minimales de repos ;
- (b) la durée minimale des congés annuels payés ;
- (c) le taux de salaire minimal, y compris ceux majorés pour les heures supplémentaires ; le présent point ne s'applique pas aux régimes complémentaires de retraite professionnels ;
- (d) les conditions de mise à disposition des travailleurs, notamment par des entreprises de travail intérimaire ;
- (e) la sécurité, la santé et l'hygiène au travail ;
- (f) les mesures protectrices applicables aux conditions de travail et d'emploi des femmes enceintes et venant d'accoucher, des enfants et des jeunes ;
- (g) l'égalité de traitement entre hommes et femmes ainsi que d'autres dispositions en matière de non-discrimination.

Ces règles doivent être fixées par des dispositions législatives, réglementaires ou administratives et/ou par des conventions collectives ou sentences arbitrales déclarées d'application générale⁴ dans le cas des activités du secteur de la construction (auquel l'Annexe fait référence), alors que les États membres peuvent choisir d'imposer des règles ancrées dans des conventions collectives pour des activités qui ne relèvent pas du secteur de la construction (en vertu du second tiret de l'Article 3(10)). Ils peuvent également, conformément au Traité, imposer l'application de conditions de travail concernant des points autres que ceux visés dans la Directive dans la mesure où il s'agit de dispositions d'ordre public (en vertu du premier tiret de l'Article 3(10)).⁵

³ Voir aussi le Préambule 20 de la Directive, qui indique que la Directive n'affecte ni les accords conclus par la Communauté avec des pays tiers ni les législations des États membres relatives à l'accès sur leur territoire de prestataires de services de pays-tiers. La Directive ne porte pas non plus atteinte aux législations nationales relatives aux conditions d'entrée, de résidence et d'emploi de travailleurs ressortissant de pays tiers.

⁴ Voir à cet égard aussi l'Article 3 (8) qui offre des possibilités plus avancées en l'absence d'un système de déclaration d'application générale de conventions collectives.

⁵ Article 3 (10). Pour plus de détails, veuillez consulter la Communication de la Commission concernant la mise en œuvre de la Directive 96/71/EC, COM (2003) 458 final, 25.7.2003.

Mesures d'information, de contrôle et de juridiction dans la DTD

Afin d'assurer l'efficacité pratique du système établi, l'Article 4 de la Directive prévoit la coopération entre les États membres en matière d'information. Des bureaux de liaison sont désignés pour surveiller les conditions de travail et pour servir de correspondants et de points de contact pour les autorités dans d'autres États membres, pour les entreprises qui détachent des travailleurs ainsi que pour les travailleurs détachés eux-mêmes. En vertu de l'Article 4(3) de la Directive, chaque État membre doit prendre les mesures appropriées pour rendre les informations concernant les conditions de travail et d'emploi visées à l'Article 3 généralement accessibles. Qui plus est, l'Article 5 stipule que les États membres doivent prendre des mesures adéquates en cas de non-respect de la DTD. Ils doivent veiller en particulier à ce que les travailleurs et/ou leurs représentants disposent de procédures adéquates aux fins de l'exécution des obligations prévues par la DTD. Dans son Article 6 la Directive établit également la compétence judiciaire, stipulant qu'une action en justice peut être intentée dans l'État membre sur le territoire duquel le travailleur est ou était détaché.

2. Contexte juridique de la DTD : droit international privé et droit du travail national

Dans le chapitre 2 nous esquissons la toile de fond juridique dans laquelle la DTD fonctionne. Nous estimons cela nécessaire pour les raisons suivantes :

- pour montrer qu'il est nullement possible d'interpréter la DTD de manière isolée, mais qu'il est impératif de la lire dans le contexte du droit international privé (DIP) ;
- pour promouvoir une meilleure compréhension de l'influence de la DTD sur les systèmes nationaux ; et
- pour identifier les zones problématiques dans l'interaction entre les systèmes que tout instrument relatif à l'application et l'exécution de la DTD doit prendre en compte pour être efficace.

La DTD et le droit qui s'applique au contrat de travail

La DTD porte sur le droit qui est applicable à la relation de travail de travailleurs détachés. En grande partie ce sujet relève également des règles du droit international privé (DIP). La DTD reconnaît ce chevauchement en faisant ouvertement référence, dans son préambule, à la Convention de Rome de 1980.⁶ Le droit international privé joue un rôle, de façon plus implicite, dans l'Article 3(1) qui énonce que « les États membres veillent à ce que, *quelle que soit la loi applicable à la relation de travail* (italique ajouté par AH/MH), les entreprises visées à l'Article 1 (1) garantissent aux travailleurs détachés sur leur territoire des modalités et conditions de travail visées ci-après... ». Ainsi, il est indiqué que le droit qui s'applique au contrat de travail est régi par le droit international privé (à l'heure actuelle le Règlement Rome I⁷), mais la DTD surimpose – le cas échéant – la protection minimale des lois de l'état d'accueil sur la protection déjà fournie sous le droit applicable au contrat en vertu du Règlement Rome I.

Les règles de DIP ciblent les affaires individuelles. Article 8 du Règlement Rome I tente d'identifier la loi ayant le lien le plus étroit avec le contrat de travail individuel, tenant compte de l'ensemble des circonstances.⁸ Dans ce domaine, le lieu de travail joue un rôle important, mais pas toujours déterminant. En cas de détachement de brève durée, notamment, le contrat restera régi par le droit du lieu de travail *habituel*. Cette règle assure un certain degré de continuité quant à la loi qui s'applique au contrat individuel. Cela a été jugé plus important que de soumettre tous les travailleurs employés sur le territoire d'un état particulier de manière intégrale et exclusive au droit de cet état. Il est possible que le lieu de travail habituel coïncide fréquemment avec le pays d'origine de l'employeur, mais juridiquement, ce sont deux facteurs de rattachement bien séparés. Il convient donc de se rendre compte que l'application de la loi du pays dans lequel un travailleur détaché travaille habituellement au contrat de travail individuel est fondée sur la Convention de Rome et sur le Règlement Rome I et non, en principe, sur les règles qui gouvernent le

⁶ Voir les paragraphes 6-11 du préambule ainsi que la note en bas de page du Chapitre 2 du rapport intégral page 14.

⁷ A titre de comparaison entre le Règlement Rome I et la DTD : le Livre Vert sur la transformation de la Convention de Rome de 1980 sur la loi applicable aux obligations contractuelles en instrument communautaire ainsi que sur sa modernisation (2002) 654 version définitive, page 36.

⁸ Livre Vert Rome I Com(2002), 654, page 35 et suivantes.

marché intérieur.⁹ En outre il ne faut pas perdre de vue que selon le système du Règlement Rome I et la Convention de Rome le lieu d'établissement de l'employeur ne suffit pas en tant que tel pour que le travailleur détaché soit assujéti au droit de l'état d'envoi. Le lieu d'établissement est fondamental pour l'application des règles du marché intérieur. Pour pouvoir bénéficier de la liberté de fournir des services, l'employeur doit être « établi » dans un État membre, c'est-à-dire y exercer une activité économique de manière régulière, avant de pouvoir détacher des travailleurs sur un autre État membre.¹⁰

La DTD semble aussi faire référence au critère de 'lieu de travail habituel' employé dans le Règlement Rome I et la Convention de Rome en énonçant à l'Article 2(1) que par « travailleur détaché » on entend un travailleur qui, pendant une période limitée, exécute son travail sur le territoire d'un État membre autre que l'État membre sur le territoire *duquel il travaille habituellement* (italique ajouté par AH/MH). Néanmoins, dans la partie concernant le lien entre la DTD et le droit international privé force est de constater qu'il existe une tension fondamentale entre l'approche individuelle du droit international privé et les approches de type plus général, collectif, du droit des conventions collectives et des pratiques d'exécution. Pour rendre ces systèmes le plus compatibles possible, les critères employés pour vérifier le respect de la PDW devraient, dans la mesure du possible, (aussi) tenir compte de considérations relevant du droit international privé. Pour ce qui est de l'applicabilité du régime spécial de la DTD les États membres et l'UE devraient veiller à l'existence d'un lien réel et pertinent entre l'état d'envoi et la relation de travail du travailleur détaché pendant le détachement. Il convient de gérer cette exigence, qui découle de la définition de 'travailleur détaché' dans l'Article 2(1) de la DTD ainsi que de considérations de droit international privé séparément de l'exigence découlant de la Convention que l'employeur soit véritablement établi dans un État membre pour bénéficier de la libre prestation de services et de l'exigence de l'Article 1(3) qu'une relation de travail existe entre l'entreprise d'envoi et le travailleur pendant la période de détachement. Le fait que l'employeur porte les frais du détachement pourrait être l'un des indices établissant un lien pertinent quant à la relation de travail avec l'état d'envoi.

Il est préférable de détailler les critères pertinents pour le détachement au niveau de l'UE (voir recommandation 1, Chapitre 5).¹¹ Au niveau national, certains États membres devraient tenir (davantage) compte de la protection des travailleurs détachés à partir de leur territoire. Afin d'éviter des lacunes dans la protection légale de travailleurs détachés, il peut s'avérer nécessaire d'évaluer si des travailleurs qui sont

⁹ L'interaction précise entre les règles du marché intérieur et les règles de conflits de loi du Règlement Rome I n'est pas Claire à l'heure actuelle. Par contre, il est clair que le principe du pays d'origine tel qu'énoncé dans la Directive sur les Services n'est pas déterminant pour la loi qui s'applique aux contrats de travail de travailleurs détachés. Voir la Directive 2006/123/CE du Parlement européen et du Conseil du 12 décembre 2006 sur les services dans le marché intérieur JO L 376, 27.12.2006, pages 36-68 14, préambule paragraphes 82, 86-87.

¹⁰ Établir si l'employeur est un prestataire de services dans le sens de la Convention de Rome est une chose, établir quel droit s'applique au contrat de travail du travailleur qui effectue le service en est une autre. Les employés des prestataires de service transfrontaliers ne sont pas tous des travailleurs détachés ; certains peuvent être embauchés au niveau local ou y travailler de manière plus permanente. Le jugement récent dans l'affaire Vicoplus et autres (C-307/09-309/09) confirme la distinction ainsi faite entre le statut d'employeur en tant que prestataire de services et le travailleur.

¹¹ Section 5.2 page 174.

détachés à partir d'un État membre particulier sont véritablement encore protégés par leur droit du travail.¹² (recommandation 2 du Chapitre 5)

La DTD et les systèmes nationaux de droit de travail.

Plusieurs pays ont signalé avoir eu des difficultés à concilier la DTD et la jurisprudence du marché intérieur avec leur système pour l'établissement de normes de travail. L'approche « erga omnes » ainsi que les conditions énoncées à l'Article 3(8) ont donné lieu à des difficultés, non seulement en Suède et au Danemark, avec leur tradition de normalisation autonome (souvent au niveau de l'entreprise), mais aussi en Allemagne, en Italie et même au Royaume Uni (dans des secteurs tels que la construction, où des syndicats assez puissants existent encore). De plus, l'effet de l'existence de la DTD sur l'interprétation de la disposition du traité sur la libre circulation de services (comme il ressort des affaires Rüffert et Laval) peut affecter la possibilité d'établir des normes de travail par moyen d'autres mécanismes que ceux fournis par la DTD, comme les clauses sociales dans des contrats de marché (privé et/ou public).

Plusieurs États membres ont modifié leur système afin de respecter la DTD et la jurisprudence de la CJE. Toujours est-il qu'à l'heure actuelle tous les États membres n'ont pas utilisé les moyens à leur disposition pour contrecarrer les effets du « quatuor Laval ». Dans la mesure où ceci les concerne, ils devraient prendre les mesures suivantes (recommandation 3)¹³ : 1) Le cas échéant, faire référence de manière explicite à la méthode autonome comme moyen d'élaboration de normes minimales. 2) Identifier les CCT pertinentes et les normes pertinentes au sein desdites CCTs. 3) Assurer la transparence des normes et standards compris dans les CCTs. 4) Assurer la non-discrimination quant à l'application de standards non- législatifs.

Il n'en reste pas moins que même si l'État membre prend toutes ces mesures, certains éléments de controverse qu'on ne saurait résoudre au niveau de l'UE demeurent. Pour la plupart des éléments liés à l'Article 3(8) nous ne conseillons pas d'amendement vu que (1) les actions prises au niveau national semblent résoudre la plupart des problèmes reconnus par toutes les parties prenantes ; (2) les pays d'accueil et d'envoi ainsi que les partenaires sociaux sont divisés quant aux matières qui restent. Pourtant, nous estimons qu'une action au niveau de l'UE est nécessaire quant à (la protection de) l'exercice du droit fondamental à l'action collective (voir la recommandation 4)¹⁴, et quant à la possibilité d'imposer des clauses sociales dans des contrats de marché public (voir la recommandation 5, Chapitre 5).¹⁵ Le besoin d'action UE dans ces domaines découle d'une incertitude légale considérable relative à des matières de droits fondamentaux et/ou des obligations internationales ainsi que de l'effet horizontal éventuel de la jurisprudence de la CJE. Il est peu probable, en outre, que dans un avenir proche une jurisprudence supplémentaire de la CJE mette un terme à l'incertitude quant à l'action collective.¹⁶

¹² Pour davantage de détails, voir Chapitre 2.2 et Chapitre 5.2, page 174.

¹³ Section 5.2, page 178.

¹⁴ Section 5.2 pages 179; voir aussi la discussion sur les cas litigieux ci-après.

¹⁵ Voir la Section 5.2 'La DTD et les systèmes nationaux de droit de travail – les problèmes causés par l'Article 3(8) DTD et la jurisprudence de la CJE' page 4 et suivantes, recommandations 3-5.

¹⁶ Section 5.2 pages 180.

En ce qui concerne l'action collective, la jurisprudence de la CJE a laissé planer le doute sur le rôle à jouer par les syndicats quant à la défense des droits des travailleurs détachés. Les auteurs de cette étude estiment qu'il vaudrait la peine de détailler en quelle mesure l'Article 3(7) pourrait être applicable plutôt que l'Article 3(8) dans une situation dans laquelle les syndicats soutiennent simplement les travailleurs détachés dans leurs négociations avec leur employeur sur les conditions de travail pendant la période de détachement. De même, l'Article 5 de la DTD pourrait revêtir de l'importance quand les syndicats emploient une pression collective pour faire en sorte que des règles qui sont déjà applicables soient appliquées. Nous recommandons que l'UE utilise l'adoption d'une nouvelle initiative législative pour améliorer la mise en œuvre, l'application et l'exécution de la directive pour clarifier la différence entre les actions collectives destinées à imposer des standards de pays d'accueil dans le sens de l'Article 3(8) d'une part et les actions collectives par les travailleurs détachés afin d'obtenir un accord sur de meilleures conditions de travail comme énoncé à l'Article 3(7) ou pour exécuter les droits découlant de l'Article 5 d'autre part¹⁷. Un autre problème qui mérite réflexion est l'effet des dommages-intérêts sur l'usage effectif du droit de grève. Il pourrait s'avérer utile également de prendre en compte la suggestion faite dans le 'Monti report' d'insérer une disposition assurant que le détachement de travailleurs dans le contexte de la prestation de services transfrontalière ne nuise pas au droit de prendre des actions collectives.¹⁸

Quant aux possibilités des États membres d'inclure des clauses sociales dans des contrats de marché public, il convient de clarifier dans quelle mesure l'adhésion d'un État membre à la Convention No. 94 pourrait enfreindre le droit de l'UE, notamment si l'obstacle que des clauses sociales pourrait établir quant à la libre prestation de services peut être justifié au vu de l'intérêt général, tenant compte des valeurs propagées par la Convention No 94 de l'OIT.

¹⁷ Pour confirmer plus en détail la liberté des syndicats de l'état d'accueil d'inciter à l'adhésion aux conventions collectives locales (comme moyen d'élaboration de standards généraux) semble nécessiter une nouvelle formulation des exigences de l'Article 3(8). Nous estimons que ceci peut se faire en remplaçant l'accent actuel sur l'application/l'applicabilité générale par des demandes précises de de non-discrimination et de transparence.

¹⁸ D'après le Règlement (CE) No 2679/98 (le soi-disant Règlement Monti), Voir M.Monti, A new Strategy for the single market, 9 mai 2010 ; voir aussi la suite dans les Propositions 29 et 30 de la Communication de la Commission, Towards a Single Market Act. For a highly competitive social market economy. 50 proposals for improving our work, business and exchanges with one another Brussels, [Vers une Loi relative au Marché Unique. Pour une économie sociale de marché extrêmement concurrentielle. 50 Propositions pour améliorer notre travail, nos affaires et nos échanges, Bruxelles] le 27 octobre 2010. COM(2010) 608 version définitive.

3. Évaluation détaillée de la mise en œuvre et de l'application de la DTD

Le chapitre 3 porte sur les problèmes qui existent dans la pratique quant à la mise en œuvre et l'application de la Directive. Cette partie de la recherche cible plus particulièrement les Articles 1 et 2 de la DTD, concernant la définition de détachement et de travailleurs détachés et l'Article 3 de la DTD, relative aux conditions de travail et d'emploi des travailleurs détachés. Vu que les partenaires sociaux peuvent être impliqués tant dans la mise en œuvre que dans l'application de ces articles de la Directive, les aspects pertinents de leur rôle sont étudiés. Le régime transitoire mis en œuvre après l'adhésion des nouveaux États membres en 2004 et 2007 est étudié également à titre d'exemple des problèmes rencontrés en pratique quant à la définition de détachement et à la situation juridique des travailleurs détachés. De plus, un aperçu des cas affaires litigieux dont les médias ont fait état est fourni.

Champ d'application personnel

Remarques générales

La Directive vise à coordonner les législations des États membres de manière à prévoir des règles claires et nettes pour la protection minimale de l'état d'accueil à respecter par les employeurs qui détachent des travailleurs en vue d'effectuer un travail temporaire de prestation de services sur leur territoire. Pour ce genre de services la DTD – interprétée dans le sens de la jurisprudence de la CJE – établit un cadre légal dans lequel la protection des travailleurs du pays d'accueil est considérée être applicable, mais seulement dans une certaine mesure. Selon les auteurs de cette étude, la catégorie de travailleurs détachés constitue donc une catégorie située entre les travailleurs mobiles qui se trouvent sur le territoire d'un autre État membre temporairement mais qui ne relèvent pas des lois dudit État membre¹⁹ et les travailleurs mobiles dont on estime qu'ils sont devenus part de la main-d'œuvre du pays d'accueil et qui relèvent donc intégralement de ses lois.

La Directive contient des critères pour distinguer le détachement des autres types de mobilité. Ces critères donnent lieu à des problèmes d'interprétation et de délimitation, qui seront évoqués ci-dessous. Afin d'éviter de tels problèmes plusieurs États membres ont décidé de ne pas inclure les critères de champ d'application personnel employés dans la DTD dans leurs dispositions d'exécution mais plutôt d'appliquer les standards pertinents du droit de travail et de la protection des travailleurs à toute personne travaillant sur le territoire (ou des critères similaires).²⁰ Un net inconvénient de cette méthode de mise en œuvre est qu'elle peut mener à une application excessive de la disposition d'exécution. Ceci peut résulter en un fardeau excessivement lourd

¹⁹ Par exemple un travailleur qui participe à un séminaire ou à un programme de formation dans un autre État membre.

²⁰ La DTD contient une liste de standards pertinents en la matière, mais certains États membres étendent la protection plus loin que les domaines de protection énumérés dans la directive. Le Royaume Uni, par exemple, n'a pas de disposition d'exécution mais applique toutes ses formes de protection légale aux travailleurs détachés en vertu des champs d'application individuels des statuts eux-mêmes.

sur la libre circulation de services, dans la mesure où les lois protectrices nationales sont également en vigueur dans des situations où une application de ce genre est dépourvue d'effet utile et/ou disproportionnée. Par conséquent, nous conseillons aux États membres d'introduire la notion de détachement dans leur législation (recommandation 6).²¹

L'analyse des affaires²² les plus médiatisées montre clairement que les affaires plus controversées portent le plus souvent sur des situations « d'usage créatif » des libertés dans lesquelles la prestation de service est utilisée, de manière à éviter l'application (intégrale) du droit du pays d'accueil. Parmi les exemples figure l'établissement de sociétés écran qui embauchent des travailleurs spécifiquement pour les détacher sur d'autres États membres, ainsi que des cas de détachements consécutifs d'un seul travailleur sur un seul État membre par plusieurs « employeurs » dans plusieurs États membres.²³ Dans certains cas on peut avoir des doutes sur l'établissement réel d'un employeur dans l'état d'envoi, dans d'autres cas un lien entre le contrat de travail et l'état d'établissement de l'employeur fait défaut. Une définition claire et applicable de la notion de détachement ainsi que de la notion de travailleur détaché, fondée sur l'objectif de la Directive, pourrait y remédier. En outre, pour éviter que les employeurs contournent ou abusent des règles, il convient d'établir une définition précise d'« établissements établis dans un État membre » (voir par exemple l'article 4(5) de la Directive sur les Services 2006/123/CE). Seulement des entreprises véritablement « établies » peuvent bénéficier de la liberté de fournir des services et donc de la DTD.

Des problèmes quant aux critères spécifiques employés dans la DTD

Conformément à l'Article 2 de la DTD, le travailleur doit être détaché « pendant une période limitée vers un État membre autre que celui sur le territoire à partir duquel il travaille habituellement ». Néanmoins la Directive ne donne aucune indication sur la nature temporaire du détachement, ni sur la façon dont il convient de déterminer s'il existe effectivement un pays dans lequel l'employé travaille habituellement. En général, les mesures d'application nationales ne contiennent pas non plus de critères spécifiques. Certains États membres ont pris des précautions pour limiter les pratiques abusives (par exemple LUX, FR) qui soulignent l'établissement d'un lien réel entre l'employeur et son pays d'origine. Cependant on ne trouve que rarement des dispositions ciblant l'établissement d'un lien réel entre le travailleur et son lieu d'emploi habituel au sein dudit pays.²⁴

En ce qui concerne la définition : « pendant une période limitée », il serait fortement à conseiller de clarifier la définition de détachement temporaire visée à l'Article 2 DTD, soit en incluant une présomption réfutable de mobilité permanente au cas où la durée du détachement dépasse une certaine période, et/ou en établissant quelles relations minimales avec le pays dans lequel le travailleur détaché travaille habituellement doivent exister pour que la mobilité soit qualifiée de détachement dans le sens de la DTD (recommandation 11 du Chapitre 5). Dans les deux cas de figure il convient de

²¹ Section 5.3 'Faire la distinction entre le détachement et les autres genres de mobilité -les problèmes causés par (le manque de) mise en œuvre et de l'application au niveau national, pages 182-183.

²² Voir la section 3.5, page 54, et l'Annexe I.

²³ Pour davantage d'exemples voir la Section 3.5, page 54.

²⁴ La France a une disposition excluant les employés embauchés en France du champ d'application de leurs règles de mise en œuvre, L 1262/3 voir la page 32, 46, du Chapitre 3.2.

respecter les exigences du Traité quant à la libre circulation de services. Pour souligner la différence entre la « mobilité passive » d'un travailleur détaché dans le cadre de prestation de services par son employeur et la « mobilité active » d'un travailleur entrant sur le marché du travail d'un autre État membre pour y profiter des perspectives d'emploi, il serait judicieux de modifier le texte de la deuxième phrase de l'Article 3(7) de la DTD en obligeant le prestataire de services à prendre en charge le remboursement des frais de voyage, de pension/hébergement (recommandation 12 du Chapitre 5). Dans tous les cas de figure, mais surtout quand il n'est pas possible d'aboutir à un accord sur ces sujets au niveau de l'UE, les États membres eux-mêmes doivent veiller à ce que la nature authentique du détachement temporaire soit maintenue de manière transparente et efficace par les autorités qui se chargent du suivi et de l'exécution (recommandation 13 du Chapitre 5).²⁵

La DTD doit être envisagée dans le contexte de la libre prestation de services, telle qu'elle est protégée par l'Article 56 du traité de Rome. Pourtant, toutes les mesures d'exécution nationales ne restreignent pas leur application aux cas dans lesquels un service transfrontalier est fourni par l'employeur à un destinataire du service se trouvant dans un autre État membre. Un cas d'espèce, qui suscite des débats dans plusieurs États membres, est le stagiaire qui est envoyé à l'étranger dans le cadre de sa formation.²⁶ Un stagiaire est sur le territoire du pays d'accueil pour des raisons professionnelles, et peut bénéficier de la liberté de *recevoir* des services plutôt que de les *fournir*. Pour deux genres de détachement, la DTD semble requérir l'existence d'un contrat de prestation de service entre l'employeur et le destinataire du service dans l'état d'accueil.²⁷ Une interprétation stricte de cette exigence empêcherait l'application de la DTD dans le cas des détachements pour lesquels le contrat de travail est conclu par une entité autre que le prestataire de service.²⁸ Nous pensons que le fait qu'il existe un intermédiaire entre l'employeur et le destinataire des services ne devrait pas faire obstacle à l'application de la Directive dans les cas qui, pour le reste, répondent aux objectifs de la Directive. Il est opportun de clarifier et si nécessaire de modifier les deux exigences pour les concilier avec l'objectif de la Directive (recommandation 7, Chapitre 5).²⁹ À défaut de solution au niveau de l'UE, une clarification plus détaillée par les États membres serait la bienvenue.

Problèmes liés à des secteurs spécifiques

Le concept de détachement de travailleurs dans le cadre de la prestation de services transnationale dans la DTD comprend les travailleurs intérimaires. Néanmoins, le statut de ces travailleurs au sein du marché intérieur suscite des débats. Dans son avis

²⁵ Section 5.3, pages 185-186.

²⁶ Ceci a notamment été évoqué dans les rapports des experts Belges et Luxembourgeois. Dans ces pays, des critères ont été établis pour déterminer l'application de la DTD aux stagiaires. Au Royaume-Uni et aux Pays-Bas, l'application de la mesure de mise en œuvre aux stagiaires n'est pas claire. Voir aussi le Chapitre 3.2, page 40-41.

²⁷ Demandé de manière explicite dans l'Article 1(3)a et de manière implicite dans l'Article 1(3)c sur les détachements.

²⁸ L'expert suédois discute de la position du chauffeur dans le transport international effectuant une activité de cabotage dans une situation dans laquelle un transitaire a conclu le contrat de cabotage. L'expert allemand mentionne la situation de double détachement dans laquelle un travailleur est détaché sur son propre territoire vers une entreprise utilisatrice qui par la suite détache le travailleur sur un autre État membre.

²⁹ Section 5.3. 'Le détachement dans le contexte de la prestation de services-problèmes causés par la Directive', pages 183-184. Pour une illustration plus détaillée du problème voir la Section 3.2. 'prestation d'un service', pages 40-43.

dans l'affaire Vicoplus, l'Avocat-Général Y. Bot a signalé que même si l'employeur profite de la libre circulation des services, le travailleur intérimaire peut (aussi) relever du régime de transition qui permet aux États membres de limiter la libre circulation de travailleurs.³⁰ Dans son jugement du 10 février 2011 la CJE a adopté la conclusion de l'Avocat-Général à ce sujet.

En vertu de l'Article 3(9) de la DTD les états d'accueil peuvent décider qu'il convient de garantir à des travailleurs détachés par des agences de travail intérimaire une protection équivalente à celle accordée aux travailleurs intérimaires nationaux. À l'heure actuelle il est difficile de savoir comment cette disposition particulière peut se concilier à la Directive relative au Travail Intérimaire et l'interprétation des dispositions du Traité. Une clarification sur l'interaction entre la Directive relative au Travail Intérimaire et la DTD serait la bienvenue (recommandation 8, Chapitre 5).³¹

Même si la Directive s'applique aux travailleurs des transports (à l'exception du personnel navigant de la marine marchande), le système de la Directive n'est pas très adéquat pour gérer les travailleurs qui ne travaillent pas *dans* un pays bien précis, mais plutôt *à partir* d'un pays bien précis. La DTD est le plus souvent présumée applicable au cabotage mais le suivi de la protection s'avère fort difficile. Qui plus est, certaines exigences de la DTD (notamment la présence d'un contrat de service entre l'employeur et un destinataire dans l'état d'accueil) sont susceptibles d'entraver l'application de la protection alléguée aux travailleurs des transports, même en cas de cabotage. Il semble judicieux d'énoncer une règle subordonnée pour que la DTD soit appliquée aux travailleurs des transports. En l'absence d'une telle règle et dans l'attente d'une solution européenne, les États membres peuvent impliquer les partenaires sociaux du secteur pour fixer l'application et l'exécution adéquate de la DTD à ce secteur (recommandation 9 et 10, Chapitre 5).³²

Le régime de transition

Plusieurs États membres « de longue date » (EU15) ont appliqué ou continuent d'appliquer un régime de transition quant à la libre circulation de travailleurs de huit des dix nouveaux États membres depuis 2004 (EU8) et de deux autres nouveaux États membres (la Roumanie et la Bulgarie, EU2) ayant adhéré en 2007. L'Allemagne et l'Autriche sont les seuls pays ayant également négocié la possibilité d'imposer des restrictions sur la libre circulation de services dans la mesure où ceux-ci impliquent le détachement transfrontalier de travailleurs. Dans le contexte actuel, une étude du régime de transition est intéressante pour plusieurs raisons:³³

- Les actions engagées par les États membres pendant cette période peuvent fournir des informations sur les domaines considérés comme problématiques à l'égard de la mobilité de la main-d'œuvre.
- Dans les pays qui permettent la libre prestation de services, mais non la libre circulation de travailleurs, le régime de transition montre comment les États membres posent la limite entre ces deux libertés.

³⁰ Conclusion du 9 septembre 2010, Affaires jointes C-307/09 jusqu'à C-309/09. Voir aussi C-113/89 (Rush Portuguesa).

³¹ Section 5.3 'agences de travail intérimaire, pages 185-186.

³² Section 5.3, 'travailleurs dans le domaine du transport', page . 187.

³³ Pour une description plus détaillée des mesures de transition, voir la section 3.4, pages 51-53.

Quant au premier aspect, il est intéressant de remarquer que tant en Belgique qu'aux Pays-Bas, on a tenu à rendre la levée du régime de transition dépendante de mesures qui apporteraient des améliorations dans l'exécution du droit du travail et le suivi de la mobilité. Ceci souligne l'importance de moyens d'exécution efficaces quant à la protection nationale du travail pour régler la migration en général et le détachement en particulier. À cet égard une étude des mesures à adopter pendant la période de transition peut également fournir des informations sur les meilleures pratiques pour contrecarrer les abus.

Plusieurs pays ont adopté des mesures visant à s'assurer que le travailleur se trouve dans une situation de détachement « authentique ». Les Pays-Bas, par exemple, tenaient à vérifier si l'entreprise d'envoi est véritablement établie dans le pays d'origine et y effectue des activités économiques régulières ou était plutôt une société écran. Au Danemark le titre de séjour requis est uniquement délivré si certaines conditions sont respectées. Lesdites conditions contiennent des exigences quant à la nature permanente de l'emploi dans l'entreprise effectuant le détachement, ainsi que l'exigence que le travailleur détaché ait l'intention et la possibilité de retourner dans son pays d'origine ou au lieu d'établissement de l'entreprise une fois le travail fini. Le Luxembourg et la France ont également imposé des restrictions, par exemple en exigeant une période d'emploi préalable dans l'état d'origine. Plusieurs arrêts de la CJE ont montré que des exigences ou pratiques de ce type peuvent causer des problèmes de compatibilité avec le droit de l'UE [en étant disproportionnées]. Ceci devrait inciter les États membres à revoir leurs systèmes pour vérifier l'existence d'incompatibilités. Quoi qu'il en soit, les mesures et l'évaluation par la CJE montrent qu'il est nécessaire et difficile de trouver des critères clairs pour faire la distinction entre le détachement et les autres genres de mobilité de travailleurs.

Concernant la distinction entre la libre circulation de travailleurs et la libre prestation de services, un conflit important a surgi quant à la situation des travailleurs intérimaires (voir ci-dessus, la note de bas de page 30). Leur statut fait actuellement l'objet d'un recours préalable à l'initiative de prestataires de services aux Pays-Bas où, depuis le 1er décembre 2005, seul un genre de détachement (en vertu de l'Article 1(3) (a)) est considéré comme exempté du régime de transition.³⁴ La CJE considère que l'application de mesures de transition à des travailleurs envoyés aux Pays-Bas par des agences intérimaires établies dans les nouveaux États membres est conforme au droit communautaire. On considère que les travailleurs en question rentrent sur le marché du travail néerlandais.

Aperçu de certaines affaires litigieuses

Dans notre questionnaire nous avons demandé aux experts nationaux de nous fournir un aperçu de certaines affaires litigieuses, tant devant les tribunaux que dans les médias. Cet exercice avait les trois objectifs suivants :

- Identifier les tendances dans les pays et les secteurs dans lesquels des problèmes ont été signalés.

³⁴ Pour (des références à) plus de détails sur l'évolution du régime de transition néerlandais quant au détachement, voir le Chapitre 3.4, note de bas de page 74, page 52.

- Identifier les aspects litigieux du détachement. Nous étions particulièrement intéressés par les modèles qui pouvaient se répéter dans les enquêtes.
- Identifier les tendances générales quant à l'exécution de la DTD.

Pour ce qui est du premier point, un débat véhément a eu lieu et continue d'avoir lieu – menant à de nombreuses affaires (notamment au sein de débats publics) – dans les États membres « de longue date » comme l'Allemagne, la Belgique, le Luxembourg, la France et les Pays-Bas. L'intérêt des états d'envoi tels que l'Estonie, la Pologne et la Roumanie est nettement plus faible. La discussion en Suède, au Danemark et au Royaume Uni est relativement récente et fortement axée sur la situation des partenaires sociaux.

Quand les affaires mentionnées sont triées par secteur, trois secteurs se distinguent : les entreprises de travail intérimaire, la construction, et le transport routier. L'agriculture a aussi donné lieu à une bonne récolte d'affaires, mais souvent celles-ci ne sont pas liées au détachement sensu stricto. D'autres secteurs nommés moins fréquemment sont les soins de santé, le pelage de crevettes, le commerce de détail, le nettoyage et le découpage de viandes.³⁵

Que ce soit dans les médias ou dans les rares affaires portées devant la cour et identifiées, on se réfère rarement aux travailleurs détachés comme à une catégorie particulière de travailleurs. Apparemment d'autres types de mobilité peuvent donner lieu à des situations de fait et problèmes comparables, même si la situation juridique du travailleur est différente. Ceci tient probablement au fait qu'au quotidien les employeurs et les travailleurs semblent plus intéressés par la possibilité de travailler à l'étranger que par le statut légal précis de leurs activités. L'aperçu des affaires ayant attiré l'attention du public illustre clairement que les affaires litigieuses portent souvent sur des situations qui ne constituent pas un détachement « correct », par exemple parce que le travailleur ne travaille pas habituellement dans un autre état que l'état d'accueil, ou parce que l'entreprise qui détache le travailleur n'est pas 'établie' dans le pays d'où le détachement se fait. Finalement, une relation de travail entre l'employeur et le travailleur détaché peut être absente. Ceci met en exergue, une fois de plus, le besoin d'une définition plus précise de la notion de « détachement » et de « travailleur détaché » qu'on puisse faire valoir.

Finalement, il faut noter que les syndicats peuvent jouer un rôle important dans l'exécution pratique de la DTD. Les actions revendicatives dans le cadre du détachement ne manquent jamais de provoquer l'attention des médias. Néanmoins, on nous a signalés – surtout au Royaume Uni – que les syndicats hésitent maintenant à soutenir des actions de ce type en raison de l'arrêt Laval. Ceci augmente les risques de grève sauvage et semble porter préjudice à la faculté de résolution de problèmes de ce genre d'actions.

Champ d'application de fond de la Directive

La Directive contient une liste de domaines de protection, établissant le « noyau dur » des protections pour lequel les États membres s'assureront que, quel que soit le droit applicable à la relation de travail, les entreprises décrites à l'Article 1(1) garantissent

³⁵ Voir l'Annexe I de l'étude comparative et, pour une analyse en profondeur, le Chapitre 3.5, pages 54-60.

aux travailleurs détachés sur leur territoire les modalités et conditions de travail stipulées dans leurs lois et leurs conventions collectives de travail. Selon l'interprétation actuelle de la Directive par la CJE, l'état d'accueil peut seulement imposer une protection dans d'autres domaines si un état peut le justifier en vertu de l'ordre public. Le caractère exhaustif ainsi accordé à la Directive souligne les limites des concepts utilisés dans la Directive. Dans cette partie de l'étude nous mettons l'accent sur l'interprétation de ces notions. Aussi, nous identifions les problèmes surgissant dans l'application de certains types de protection.

Salaires et horaires de travail

La majorité des experts estiment que les règles sur les salaires ont une importance primordiale ainsi que la santé et la sécurité et, en moindre mesure, les horaires de travail et les jours fériés. Ces règles peuvent être considérées comme le noyau le plus dur au sein du noyau dur de droits. Pourtant, l'interprétation du concept en tant que tel est floue et son application dans la pratique va de pair avec maintes difficultés.

La Directive délègue la définition de la notion de taux de salaire minimal aux États membres. En outre, la Directive permet expressément aux États membres d'employer des conventions collectives d'application générale comme moyen pour établir une protection minimale dans les domaines qui relèvent de la DTD. La DTD ne fournit pas pour autant de réponse claire à la question de savoir si un état d'accueil peut seulement imposer un taux de salaire minimal unique (montant forfaitaire) ou plutôt une panoplie de règles fixant le taux de salaire minimal dans un cas individuel (structure salariale /hiérarchie). Une différence importante peut exister entre ces deux niveaux de salaire. L'application de la structure salariale complète est donc fort importante pour permettre à la DTD de mener à conditions équitables.

La discussion sur la notion de « minimum » mise à part, force est de constater que la notion « taux de salaire » est également floue. Quelle condition de travail faut-il prendre en compte quand on détermine les taux de salaire minimum ? De plus, il existe une grande confusion quant aux standards à employer pour comparer les salaires effectivement payés au minimum prévu par l'état d'accueil. Un problème similaire (sans être identique) de comparaison émane de la possibilité que le travailleur bénéficie d'une meilleure protection offerte par le droit de l'état d'envoi comme énoncé à l'Article 3(7).

Les problèmes identifiés dans les rapports ont trait, entre autres à :

- La cotisation à des fonds ;
- La possibilité de combiner plusieurs niveaux de protection, notamment pour le tarif des heures supplémentaires ;³⁶
- La possibilité de comparer et d'échanger des avantages particuliers ;³⁷
- Des paiements particuliers relatifs au détachement et la distinction à faire entre le salaire et le remboursement de frais ;
- Complications en raison d'impôts et de primes (le problème du brut/net) ;

³⁶ Le Rapport polonais mentionne plus particulièrement le problème de concilier le coût (plus élevé) des heures supplémentaires de l'état d'envoi et le niveau salarial de base de l'état d'accueil ; Voir pour davantage d'exemples le Chapitre 3.6, page 75.

³⁷ Le Rapport polonais mentionne plus particulièrement le problème de concilier le coût (plus élevé) des heures supplémentaires de l'état d'envoi et le niveau salarial de base de l'état d'accueil ; Voir pour davantage d'exemples le Chapitre 3.6, page 76.

- Retenue des frais sur le salaire dû.

Les États membres et les partenaires sociaux ont pris des initiatives pour remédier aux problèmes soulevés par cette incertitude. Certains d'entre eux ne se sont pas bornés à faire des efforts pour identifier les dispositions applicables de façon plus détaillée, mais ont parfois aussi fourni des moyens de transformer les droits impliqués pour qu'ils soient mieux adaptés à la situation du travailleur détaché. Les exemples donnés dans le rapport intégral peuvent servir de meilleures pratiques.³⁸ Le besoin de lignes directrices européennes claires ne s'en fait pas moins ressentir, tant pour les limites de la notion de « salaires » que pour le/les standard de comparaison (voir la recommandation 15, Chapitre 5).³⁹

Un autre problème porte sur la relation entre le salaire payé et le nombre d'heures de travail effectuées. En partie, ce problème tient aux règles sur le salaire minimum dans les États membres eux-mêmes. Si le salaire minimum est fixé par heure, le nombre d'heures de travail effectuées a un impact direct sur le salaire payé en fin de journée, de semaine ou de mois. D'un autre côté, des taux de salaire mensuels peuvent donner lieu à des frais salariaux réels très différents, en fonction du nombre d'heures de travail effectuées. Les États membres sont donc encouragés à introduire un salaire minimum par heure, s'il n'existe pas encore (recommandation 16, Chapitre 5).⁴⁰

En ce qui concerne les taux de salaire réels par heure, le problème le plus important semble être la supervision et l'exécution (nationale) des dispositions sur les heures de travail. Il en va de même pour le droit aux congés payés. Même si, officiellement, ce droit fait partie du noyau dur, il semble peu pertinent en pratique. C'est seulement quand le droit aux congés payés passe par un fonds spécial pour les congés que le droit lui-même ainsi que son exécution deviennent pertinents en pratique.

Autres domaines de protection dans l'Article 3(1)

L'application de règles locales relatives à la sécurité et à la conduite n'est pas contestée et ne soulève pas de difficultés particulières. Les principales difficultés qui se présentent dans ce domaine en pratique ont trait à l'exécution pratique des consignes de sécurité et à une communication efficace au sein d'une main-d'œuvre multilingue.⁴¹ Néanmoins, les régimes de sécurité et de santé comprennent un large éventail de réglementations, allant de règles de sécurité quant au lieu de travail jusqu'à l'obligation d'effectuer des évaluations de risque régulièrement jusqu'aux systèmes de responsabilité pour accidents de travail.⁴² Les États membres ont des opinions différentes quant à l'interprétation de la portée de l'application de la disposition sur la santé et la sécurité visée à l'Article 3(1). Il serait opportun de clarifier ce sujet (recommandation 17).⁴³

³⁸ Section 3.6 'Meilleures pratiques quant à l'application des règles sur les salaires et le temps de travail', pages 75-77.

³⁹ La Section 5.4. Taux de salaires-composantes et comparaison, pages 191-192.

⁴⁰ Section 5.4, 'Taux des salaires horaires réels,' page 192-193.

⁴¹ Des problèmes au niveau de l'exécution sont signalés au Danemark, en Italie, au Luxembourg, en SW. Des problèmes linguistiques sont signalés au Luxembourg et en Belgique. La Pologne ne signale pas de problèmes dans ces domaines ! Voir Chapitre 3.7, pages 78-82. Section 5.4, 'Taux des salaires horaires réels,' page 192-193.

⁴² Voir la section 3.7 'Structure des systèmes de santé et de sécurité, p. 79-82.

⁴³ Section 5.4. 'Santé et sécurité', pages 193-194.

En outre, les régimes de santé et de sécurité de certains États membres contiennent des besoins de formation pour les travailleurs dans les lieux de travail dangereux et des examens médicaux impératifs avant de commencer le travail⁴⁴ qui causent des problèmes de reconnaissance et de coordination mutuelle et qui suscitent des questions quant à leur compatibilité avec le droit prévalent de l'UE. Si tous les États membres avaient des systèmes similaires de certification et de suivi, qui seraient par la suite reconnus mutuellement, ces problèmes seraient en grande partie réglés.⁴⁵ Malheureusement il n'en est pas ainsi.

En matière de responsabilité pour les accidents et d'assurance obligatoire contre les risques professionnels se pose un autre problème de coordination. Les États membres ont des systèmes différents pour gérer les risques professionnels, allant d'une couverture large par le biais de la sécurité sociale, parfois allant de pair avec une entrave de la responsabilité civile ; une couverture par le biais du droit de délits civils, parfois avec des règles spéciales sur le fardeau de la preuve ; et la couverture à travers des assurances particulières et impératives, souvent contenues dans des conventions collectives. À l'heure actuelle, la coordination entre les différents systèmes est loin d'être parfaite et la compatibilité avec le droit de l'UE mérite d'être examinée de plus près.

Il en va de même pour la protection de femmes enceintes et de femmes ayant accouché récemment. Les règles fort divergentes quant au congé spécial peuvent notamment poser des problèmes de coordination.⁴⁶ Pourtant, les parties prenantes ne font pas état de problèmes à cet égard, vu qu'en pratique la majorité des travailleurs détachés ne sont pas affectés par ces règles. Il en va de même pour la protection des mineurs. On ne signale pas de problèmes quant aux règles relatives à la non-discrimination non plus.

Les règles sur les entreprises de travail intérimaire, elles, jouent un rôle en pratique, notamment dans la mesure dans laquelle les États membres assujettissent cette activité économique aux restrictions et/ou autorisations spéciales. L'application de restrictions au détachement transfrontalier a beau être conforme à l'Article 3(1) (d) de la DTD, les restrictions elles-mêmes devront être évaluées au vu de l'Article 4 de la Directive sur les Travailleurs Intérimaires. La DTD permet aussi d'étendre la protection accordée aux travailleurs des entreprises de travail intérimaire au niveau de protection offert aux travailleurs pour entreprises de travail intérimaire au niveau local (conformément à l'Article 3(9) de la DTD). Cette disposition a une action réciproque avec Article 5 de la Directive relative au travail intérimaire. Il est opportun que la CE se charge du suivi de la mise en œuvre de cette dernière Directive avec une attention particulière pour la situation des travailleurs détachés (recommandation 8, Chapitre 5).⁴⁷

⁴⁴ Italie, France, Luxembourg, Voir Chapitre 3.7, page 80-82.

⁴⁵ Recommandation 18, section 5.4. 'Santé et Sécurité', page 181.

⁴⁶ Voir la Section 3.7 'Mesures protectrices visant des groupes particuliers' page s 83-86 et 'la protection contre la discrimination' pages 86-87 ainsi que la Section 5.4 'autres domaines de protection', notamment pages 193-195 et les recommandations 19, 20 et 21 pour la protection de femmes enceintes ou qui ont récemment accouché à la page 194 pour la protection des mineurs et la discrimination.

⁴⁷ Section 5.3. 'Agences de Travail Intérimaire', pages 185-186.

Ordre public - Article 3(10)

Dans l'arrêt de juin 2008 (C-319/06) dans l'affaire entre la Commission et le Luxembourg, la CJE a clairement indiqué que toute extension de la protection qui ne relève pas des autres titres de la Directive doit être justifiée sur la base de l'ordre public. Par conséquent, la pertinence de l'Article 3(10) pour la protection effective des travailleurs détachés est directement liée à l'interprétation du noyau dur de protection de l'Article 3(1). Les rapports nationaux contiennent plusieurs exemples de protection qui – en attendant une mise au point des termes employés – pourraient soit être inclus dans la notion d'ordre public, soit être inclus sous l'un des autres titres de protection mentionnés dans l'Article 3(1). La Suède n'utilise pas l'Article 3(10) pour justifier l'application de ses statuts sur le travail à temps partiel et à durée déterminée, parce que ceci est considéré être ancré dans l'Article 3(1) (g). Inversement, la France a fait état de l'application de son fonds pour congés en vertu de l'Article 3(10), estimant que ceci est régi par cette disposition plutôt que par l'Article 3(1) (b).⁴⁸ Par conséquent, pour évaluer l'efficacité et le bien-fondé de l'Article 3(10) pour assurer les intérêts fondamentaux des États membres, il faudrait d'abord clarifier le champ d'application des autres titres de protection énoncés à l'Article 3(1). (recommandation 22).

La possibilité d'utiliser l'un des titres de protection de l'Article 3(1) ne semble pas disponible pour les droits de travail collectifs, comme le droit de s'organiser, le droit de grève et le droit à la cogestion. Il n'est pas étonnant que les États membres ayant un système de droit de travail plus autonome (UK, SW, DK) considèrent tous que les droits collectifs font partie de l'ordre public, même si la Suède est le seul à avoir communiqué cela clairement à la CE. Les États membres sont invités à être plus précis quant au fondement juridique qu'ils emploient pour appliquer les dispositions nationales et pour identifier plus clairement l'application de toute protection de travail qui selon eux ne sont pas inclus dans les titres de protection de l'Article 3(10) (recommandation 23, Chapitre 5).

Finalement, la notion d'ordre public est employée actuellement tant pour la libre circulation de services que dans le contexte du droit international privé. À l'heure actuelle il n'est pas clair si la notion d'ordre public employée dans la jurisprudence sur la libre circulation de services s'applique aussi dans le contexte du Règlement Rome I et, si cela n'est pas le cas, quel impact la notion de DIP pourrait avoir sur l'interprétation de la DTD. Une clarification plus détaillée en la matière serait la bienvenue (recommandation 24, Chapitre 5).⁴⁹

Dans l'arrêt dans l'affaire entre la Commission et le Luxembourg, la CJE a indiqué clairement que la notion d'ordre public doit être interprétée de manière restrictive. Par conséquent, plusieurs États membres ont décidé de réévaluer leurs systèmes (par exemple LUX, DK, SW), afin d'éviter les contrariétés. Néanmoins, des mises en œuvre qui semblent incompatibles avec la formulation restrictive de l'Article 3(10) ont encore lieu dans plusieurs États membres, y compris en UK, IT et BE. Dans ces pays, dans la pratique, l'application trop large du droit national est mitigée par une pratique d'exécution plus restrictive, ce qui ne résout pas pour autant le problème d'incompatibilité avec le droit de l'UE.

⁴⁸ Voir la section 3.7. pages 89-90 pour davantage d'exemples.

⁴⁹ Section 5.4, 'Extension de la protection en vertu de l'Article 3(10)' pages 196-197.

4. Faire valoir les droits établis par la DTD

Le chapitre 4 traite des problèmes de suivi et d'exécution des droits instaurés par la DTD. Quand les travailleurs détachés tentent de faire valoir les droits émanant de la Directive ils rencontrent des difficultés et des obstacles. Il en va de même pour les autorités responsables du suivi des États membres d'accueil, quand elles vérifient le respect des conditions de travail en vertu de l'Article 3 (1) de la DTD et son exécution dans la pratique.

D'abord le chapitre présente les différents acteurs impliqués dans l'exécution – les travailleurs et/ou leurs représentants, les autorités nationales. Une distinction est faite entre les autorités qui contrôlent le respect des droits garantis par la Directive et les autorités qui font le suivi de la présence de travailleurs détachés sur le territoire. Ensuite, les responsabilités des acteurs de suivi quant à l'information du grand public et les exigences en matière d'informations qu'elles imposent aux prestataires de services et aux autres acteurs impliqués sont examinées. Une autre partie de l'analyse comparative a trait aux activités d'inspection et d'exécution des acteurs du suivi en pratique. Ceci porte sur la fréquence des contrôles des lieux de travail, sur la manière dont les inspections du travail et autres inspections évaluent les personnes indépendantes qui fournissent des services dans l'État membre d'accueil et la façon dont elles vérifient si une entreprise est correctement établie dans le pays d'origine. L'étendue de la coopération transfrontalière et la reconnaissance des sanctions/arrêts étrangers sont examinées également.

En outre, une attention particulière est accordée aux outils préventifs et/ou répressifs éventuels, qu'ils soient légaux ou d'autorégulation, employés pour augmenter le respect et l'exécution. Il s'agit notamment de la responsabilité solidaire des destinataires (clients/maîtres d'ouvrage/entreprises utilisatrices) d'un service effectué par des travailleurs détachés, en cas de non-paiement de salaires, de cotisations de sécurité sociale et de charges fiscales par leur employeur. Les voies de recours accessibles aux travailleurs détachés et à leurs représentants sont également examinées, ainsi que d'autres types de soutien pour les travailleurs détachés.

Les constats dans les rapports nationaux, qui sont résumés et analysés dans le Chapitre 4, révèlent et exposent clairement les failles dans les systèmes nationaux de droit du travail et leur exécution à l'égard de groupes vulnérables sur le marché du travail comme les travailleurs détachés (ou certains groupes de travailleurs détachés). Le respect peut et doit donc être renforcé par la mise en œuvre et l'application de plusieurs « outils » de suivi et d'exécution énumérés ci-dessous.⁵⁰ Mais à quel niveau faut-il le faire ?

À l'opposé des dispositions de la DTD quant au champ d'application personnel et de fond de la Directive, la DTD ne fournit pas de renseignements ou d'exigences minimales quant au niveau/à la nature du suivi et de l'exécution (Article 5). En outre, un nombre très réduit d'exigences est fourni quant à la fourniture et l'échange d'informations (Article 4) et les voies de recours pour les travailleurs détachés et/ou

⁵⁰ Consulter le Chapitre 5.5. pages 198-203 et Chapitre 5.6. pages 204-213.

leurs représentants (Article 6). Donc, au moment où ce rapport a été écrit, le suivi et l'exécution de la DTD étaient largement (voire entièrement) fondés sur le niveau fourni par le système national. En général, la conformité avec le droit de l'UE est fondée sur un système d'exécution décentralisé, ce qui signifie que le droit de l'UE est surtout appliqué par les autorités nationales et jugé par les cours nationales conformément aux règles (de procédure) nationales. Néanmoins, cela ne signifie pas (forcément) que la responsabilité des États membres de garantir le respect du droit de l'UE s'arrête dès que les limites de leur propre système sont atteintes. Il découle même de la jurisprudence de la CJE que les États membres ont la responsabilité de garantir « l'effet utile » du droit de l'UE. Ceci est fondé sur ce que l'on nomme le principe de l'effet utile ancré dans les phrases 2 et 3 de l'Article 4(3) du Traité sur l'Union Européenne (l'ancien Article 19 CE). Au vu de ce principe, les États membres doivent mettre en œuvre, appliquer et exécuter des sanctions efficaces, proportionnées et dissuasives pour garantir le respect des règles de l'UE, telles que la DTD. Il n'est donc nullement nécessaire d'accepter la situation actuelle, dans laquelle les points faibles des systèmes nationaux d'exécution sont aussi les points faibles du droit de l'UE comme un « fait accompli. » Dans la mesure du possible, cette situation peut et doit être modifiée.

À cet égard, une certaine assistance au niveau européen semble indispensable. De préférence, les outils et les règles quant à l'exécution devraient être intégrés dans un cadre européen de législation et de coopération entre les principaux acteurs concernés, pour aboutir à un niveau de respect efficace de la DTD d'une part et pour prévenir la concurrence déloyale et l'incertitude juridique entravant la prestation transfrontalière de services d'autre part.

Acteurs impliqués

Faire le suivi des conditions de travail (c'est-à-dire des droits) des travailleurs détachés

L'aperçu des acteurs nationaux impliqués dans le suivi et l'exécution offre un tableau assez varié, qui peut être évalué comme loin de l'idéal du point de vue de la promotion de la libre prestation de services et des autres objectifs de la Directive, à savoir la protection des travailleurs détachés et le besoin de maintenir une concurrence loyale. Les situations dans lesquelles plusieurs autorités étaient impliquées (Belgique, Italie, Allemagne), ou (officiellement) aucune autorité ne l'est (Royaume Uni), peuvent être qualifiées de particulièrement problématiques. De plus, la mesure dans laquelle les autorités publiques sont impliquées dans le suivi/la mise en œuvre du droit du travail varie également. À cet égard la vulnérabilité des systèmes qui dépendent de manière excessive de l'exécution du droit privé est (une fois de plus) démontrée, car cela peut mener à des situations (abusives) de non-respect impliquant des prestataires de services non fiables (Suède, Danemark, Pays-Bas, le Royaume Uni en général et l'Allemagne particulièrement quant au droit de la santé et de la sécurité).

Néanmoins, cette situation reflète le choix de la DTD d'attribuer le suivi et l'exécution des droits émanant de la Directive entièrement au niveau national (voir l'Article 5 de la DTD) sans exigences ou lignes directrices détaillées (d'harmonisation minimale) quant à la désignation de certains acteurs responsables et leurs tâches. Dans

ce sens, le problème ne provient pas d'un seul facteur, mais plutôt du « silence » au niveau de l'UE, de pair avec l'application/l'exécution de la DTD au niveau national. Néanmoins, le fait que la Directive n'est pas plus détaillée et même garde le silence ne signifie pas pour autant que les États membres ne sont pas tenus de respecter le droit prévalent de l'UE comme l'entend la Cour en appliquant des systèmes/des outils nationaux de suivi et d'exécution.

À cet égard il serait judicieux de créer une plus grande transparence dans les systèmes de suivi des pays où plusieurs autorités sont impliquées en désignant l'une d'entre elles comme point de contact principal. De plus, la mise en œuvre de davantage de mesures d'exécution publique est promue pour les pays où les systèmes nationaux n'assurent pas suffisamment l'exécution adéquate des droits des travailleurs détachés. Dans la mesure où les deux problèmes mettraient en danger « l'effet utile » de la DTD, des mesures de ce type peuvent être établies au niveau de l'UE (recommandations 25 et 26).

Le mode opératoire des autorités de suivi pose problème également. En Allemagne, les autorités douanières contrôlent tout particulièrement le respect et l'exécution (d'une partie) des règles en vigueur sur le détachement de travailleurs. Au niveau régional, 40 bureaux de douane principaux (Hauptzollämter) disposent de ce pouvoir. Par contre, dans les autres pays d'accueil ciblent, visiblement, surtout le suivi du respect du droit du travail national en général. Aucun pouvoir d'exécution n'est spécialement octroyé pour contrôler le respect des droits accordés par la DTD. Par conséquent, les organismes d'inspection agissent dans les limites de leurs prérogatives ordinaires, ce qui signifie en pratique qu'ils interprètent essentiellement le droit du travail national existant, en tenant compte des « pratiques locales » ainsi que des lignes directrices de politique interne, en tenant moins compte de la *présence* et de la situation juridique particulière des travailleurs détachés. Par conséquent une approche plus ciblée sur ce groupe semble nécessaire quant à la politique de suivi et d'exécution des autorités nationales, en désignant une « task force » et/ou en formulant des lignes directrices en matière d'inspection axées sur la situation des travailleurs détachés (recommandations 27 et 28).

Faire le suivi de la présence de travailleurs détachés

Surveiller la présence de travailleurs détachés demande un contrôle qui relève davantage du « droit migratoire » (relatif à l'accès du territoire d'un état). Dans ce contexte, des outils de suivi et d'exécution axés sur le détachement de travailleurs existent bel et bien dans plusieurs États membres. L'existence d'exigences imposant l'enregistrement ou la communication de la présence de travailleurs détachés auprès de toutes les autorités nationales de sécurité sociale pertinentes pour des objectifs de sécurité sociale (formulaires E-101, sur base du Règlement 1408/71 (maintenant Règlement 883/2004)) ou de s'inscrire pour des objectifs d'ordre fiscal dans tous les États membres faisant part de cette étude nous a été signalée. Néanmoins, dans cette étude nous nous bornons aux exigences (équivalentes) à celles qui sont visées dans la DTD pour le détachement de travailleurs dans le sens de la DTD (c'est-à-dire sur le suivi de la présence de travailleurs détachés dans le cadre du droit du travail).⁵¹ À cet

⁵¹ La définition de 'travailleur détaché' en vue de la sécurité sociale et des impôts n'est pas entièrement similaire à celle de la DTD. Les activités de suivi ne se superposent pas complètement non plus. Il faudrait effectuer une autre étude (à conseiller) pour étudier le suivi des travailleurs détachés de

égard nous avons constaté qu'en Suède, en Italie, aux Pays-Bas et au Royaume Uni une autorité effectuant le suivi de la présence de travailleurs détachés fait défaut. Dans lesdits pays, aucun organisme public notifie les travailleurs détachés ni ne recueille des informations relatives au nombre de travailleurs détachés sur leur territoire, dans le sens de la DTD. Néanmoins, l'Italie, les Pays-Bas et le Royaume Uni appliquent des systèmes d'exigence quant aux permis et visa pour (certains) travailleurs détachés qui sont des ressortissants d'un pays tiers (à des fins de droit migratoire et/ou de régime de transition). Comme indiqué ci-dessus dans la partie concernant les « régimes de transition », ces systèmes peuvent causer des problèmes de compatibilité avec le droit de l'UE (être disproportionnés).⁵²

Est-ce que l'exigence imposée aux prestataires de services de simplement indiquer la présence de travailleurs détachés est justifiée et proportionnée comme condition préalable au suivi des droits des travailleurs détachés ? Cette question mérite plus ample réflexion (recommandation 27). La Belgique, le Danemark, la France, l'Allemagne et le Luxembourg appliquent des systèmes de notification générale ou des systèmes de « pré-déclaration » pour travailleurs détachés, indépendamment de leur nationalité et leur situation de détachement spécifique.

Obligations de notification du point de vue d'un pays d'envoi

Quant aux pays qui sont surtout des pays d'envoi tels que l'Estonie, la Roumanie, la Pologne et autres pays d'envoi importants (l'Allemagne, la Belgique, les Pays-Bas et la France) nous avons étudié les exigences d'enregistrement imposées aux travailleurs détachés à partir de leurs territoires : dans tous les pays, seules les obligations en vertu de Règlement 1408/71 / Règlement 883/2004 sont en vigueur. En vertu dudit Règlement, les autorités responsables enregistrent les travailleurs détachés envoyés à un autre État membre en délivrant des formulaires E-101 aux employeurs. Le rôle de (l'ancien) formulaire E-101 (actuellement formulaire A1) est d'indiquer la législation applicable pour établir les droits à la sécurité sociale des travailleurs migrants, qu'ils soient employés ou indépendants, ainsi que les modalités de paiement des cotisations respectives. Le formulaire E-101(A1) fournit des informations pertinentes pour établir les droits en matière de sécurité sociale⁵³ mais ne reflète pas taux salarial ni les conditions de travail.

Implication des partenaires sociaux et autres acteurs

À l'exception de la législation sur la santé & la sécurité, le contrôle du respect d'autres lois relevant du droit du travail, voire des conventions collectives, n'a jamais été pris en compte pour les acteurs publics au Danemark et en Suède. Ceci est réservé aux partenaires sociaux et, dans les (rares) secteurs industriels sans partenaires sociaux organisés, aux travailleurs individuels eux-mêmes. Par conséquent, les syndicats danois et suédois sont (en pratique) les seuls acteurs à contrôler le respect

manière globale (y compris toutes les disciplines juridiques pertinentes). Voir Chapitre 4, pages 101-104.

⁵² Voir les pages 14-15 du présent document de synthèse. Voir notamment les affaires VanderElst (C-43/93), Commission-Luxembourg (C-445/03), Commission v Autriche (C-168/04) et Commission v Allemagne (C-244/04) et pour les Pays-Bas l'affaire Vicoplus en cours (C-307-309/09).

⁵³ Les prestations de maladie, le congé maternité et paternité, la retraite, les accidents du travail, les maladies professionnelles, le chômage et les allocations familiales.

des règles mises à part celles relatives à la santé et la sécurité sur le lieu du travail. Dans les deux cas de figure, des doutes ont été émis concernant la possibilité pour les syndicats de contrôler efficacement tous les travailleurs détachés. Les syndicats n'ont pas les ressources nécessaires pour y arriver. De plus, les possibilités pour les syndicats de contrôler si les travailleurs détachés ne sont pas privés de leurs droits, sont déterminées par le fait que leur employeur, ou tout au moins le maître d'ouvrage, est tenu à une CCT ou non. Sans conventions collectives, les syndicats n'ont pas de moyen de pression sur l'employeur quant aux taux salariaux etc.

En dehors des pays nordiques, Danemark et Suède, les partenaires sociaux sont impliqués dans le contrôle/l'exécution des droits des travailleurs détachés et leur présence seulement dans une mesure (très) limitée. Si les syndicats découvrent des irrégularités, ils peuvent prendre des initiatives à leur portée, comme la médiation et la régularisation de la situation ou une action collective (spontanée) ; ou ils peuvent signaler la situation auprès de l'inspection nationale responsable, qui peut alors faire des enquêtes plus poussées. Dans tous les autres pays on constate que les partenaires sociaux manquent de ressources (financières) et d'accès aux données nécessaires pour accomplir leurs tâches de façon adéquate. La plupart des autorités nationales ne se sentent pas (particulièrement) responsables du contrôle du respect du droit du travail au niveau des CCT. Elles ne collaborent pas non plus avec les partenaires sociaux de façon très flexible. Cette situation mène à une absence nette de contrôle et d'exécution de droits au niveau de la CCT. Quant au recours éventuel aux actions collectives comme stratégie d'exécution, il faut noter qu'au Royaume Uni les syndicats dépendaient entièrement de leur force de frappe collective (assez similaire à celle des pays nordiques). Cependant, après les décisions Viking et Laval, ils se sentent désormais fort limités dans leur marge de manœuvre.

Pour conclure : il faut apporter davantage de soutien financier et institutionnel aux partenaires sociaux, au niveau national. En outre, il faudrait définir des normes minimales, de préférence au niveau de l'UE, pour le contrôle/l'exécution adéquate des droits au niveau de la CCT ainsi que des lignes directrices en vue d'une coopération entre les autorités et les partenaires sociaux (recommandation 31). À cet égard, les pays pourraient tirer des enseignements de leurs « meilleures pratiques » réciproques, comme en Estonie l'exigence stipulant qu'une autorité de contrôle doit répondre à une réclamation par écrit de la part d'un syndicat sur des violations du droit du travail au plus tard dans l'espace de deux semaines. Le rapport italien sur (le soutien fourni aux) initiatives locales des syndicats et le rapport néerlandais sur les « bureaux vérifiant la conformité », établis par les partenaires sociaux en vue de contrôler le respect de leur CCT sectorielle, sont d'autres exemples qui pourraient donner de l'inspiration.⁵⁴

Les autres acteurs concernés

En Allemagne, au niveau de l'entreprise, les syndicats sont obligés de contrôler la conformité avec les conventions collectives d'application générale qui contiennent des conditions de travail minimales qui concordent avec le décret d'application allemand relatif à la loi sur le détachement des travailleurs.⁵⁵

⁵⁴ Voir la section 4.2, engagement des partenaires sociaux, pages 97-99.

⁵⁵ Voir la section 4.2, page 100.

Au Royaume Uni, le rôle d'ACAS (Advisory, Conciliation and Arbitration Service : Service de Consultance, de Conciliation et d'Arbitration) doit être souligné. ACAS est un bureau légal actuellement régi par la Loi (codifiée) relative au Syndicat et aux Relations du Travail de 1992, qui impose une obligation générale au service chargé de « promouvoir l'amélioration des relations du travail ». Il peut intervenir dans des litiges sur le travail par le biais de la conciliation et d'arbitrage, comme cela s'est fait dans l'affaire Lindsey Oil Refinery.⁵⁶

Responsabilités relatives à l'information

Identification et dissémination de l'information

En vertu de l'Article 4(3) de la Directive, les autorités de contrôle sont tenues de fournir les informations au grand public sur les droits des travailleurs détachés prévus par le droit et les conventions collectives de travail (d'obligation générale). En pratique, la dissémination de l'information par les autorités responsables se concentre sur les droits légaux uniquement. Les partenaires sociaux – en pratique surtout les syndicats – sont impliqués dans la divulgation d'information en ce qui concerne les dispositions applicables de CCT. Ce partage de responsabilités mène à un manque d'information sur les droits des travailleurs détachés au niveau de la CCT. Le Danemark, les Pays-Bas et la Suède sont les seuls à avoir pris des initiatives pour identifier les règles applicables quant à la liste du noyau dur énoncée à l'Article 3(1) DTD au niveau de la CCT et ensuite pour rendre ces informations accessibles au public.

Dans tous les pays examinés, à l'exception de l'Italie, les sites web sont le moyen prépondérant pour la dissémination de l'information, suivis des informations sur papier, les points de contact uniques (liés à la mise en œuvre de la Directive relative aux Services (Directive 2006/123) et les campagnes d'information spéciales. Notamment quant à l'information dans plusieurs langues et l'accessibilité de l'information, la situation est nettement meilleure qu'il y a quatre ans, quand la Commission Européenne a conclu, dans sa Communication 159 (2006) que de vastes possibilités d'amélioration existaient. La nécessité de fournir des efforts plus poussés pour améliorer l'accessibilité et des informations mises à jour et suffisamment précises demeure, particulièrement en Italie, mais aussi au niveau de l'UE (fiches EU) (voir la recommandation 33).

La quantité d'informations disponible mérite également une attention particulière : trop de sources d'informations peuvent nuire à la transparence. À cet égard il serait judicieux de désigner un site ou /portail web comme point d'entrée central pour diffuser des informations, tant au niveau européen qu'au niveau national (recommandation 34).

Une initiative récente de la Fédération européenne des travailleurs du bâtiment et du bois et de la Fédération des industries européennes de la construction (FIEC) constitue une meilleure pratique qui était la bienvenue : le lancement d'un portail internet comportant des informations sur les conditions de travail applicables aux travailleurs détachés dans le secteur du bâtiment. Il convient également de mentionner la

⁵⁶ Voir la section 4.2, page 100.

référence, se trouvant dans le rapport estonien, au site web EURES comme source d'informations pour les travailleurs détachés, en matière de protection applicable dans le pays destinataire.

Projets spéciaux

Comme l'ont signalé les experts nationaux, les travailleurs détachés, notamment dans les segments plus bas du marché du travail n'ont pas forcément accès à Internet.⁵⁷ Des informations adéquates sur papier et des informations particulières ainsi que des campagnes de sensibilisation axées sur les travailleurs détachés sont donc indispensables (recommandation 35). Dans certains rapports de pays des exemples sont donnés d'activités spéciales organisées par les syndicats, comme un projet bénévole ciblant des groupes linguistiques au sein de travailleurs détachés (Belgique), la publication d'un bulletin d'infos sur papier sur le droit applicable en cinq langues et des projets temporaires nommés « Poolshoogte » (Belgique) et « Kollega » (Pays-Bas). Ces initiatives ont été prises pour améliorer la connaissance sur le fonctionnement des syndicats et pour réagir aux besoins en informations des travailleurs polonais et à des fins de recrutement. Néanmoins, ces projets sont coûteux et prennent beaucoup de temps. Le soutien et la facilitation au niveau européen et national sont les conditions sine qua non pour promouvoir ce genre d'initiatives et les inscrire dans la durée.

Dissémination d'information dans l'état d'envoi

À l'heure actuelle, au niveau national, peu d'efforts sont faits pour rendre les informations sur les conditions de travail dans les états d'accueil accessibles dans les pays d'origine des travailleurs, avant leur détachement. À cet égard, les initiatives récentes des pays d'accueil de communiquer des informations aux travailleurs et aux entreprises dans les pays d'envoi (par exemple par le biais des ambassades) méritent d'être suivies, car la sensibilisation devrait se faire dès que possible pour permettre aux travailleurs de faire un choix sur le détachement en connaissance de cause. Pour aboutir à cet objectif il faudrait également s'adresser aux autorités des pays d'envoi. En vertu de l'Article 4 de la Directive 91/533 les employeurs ont l'obligation (outre l'obligation émanant de l'Article 2 d'informer un employé par écrit des aspects essentiels du contrat ou de la relation de travail, y compris le taux de rémunération – montant de base et autre composantes, congés payés, durée de la semaine de travail, CCT applicable) d'informer un travailleur qui sera détaché pour plus d'un mois, avant son départ, d'au moins : (a) la durée de l'emploi à l'étranger ; (b) la devise employée pour le paiement de la rémunération ; (c) le cas échéant, les avantages au comptant ou en nature applicables à l'emploi à l'étranger ; et (d) le cas échéant, les conditions régissant le rapatriement de l'employé.

Dans les pays qui relèvent de la présente étude, cette obligation semble uniquement assujettie au contrôle de l'inspection du travail, dans son rôle d'état d'envoi, en Estonie. Un employeur qui ne fournit pas les informations peut être soumis à une amende en Estonie. Cette bonne pratique mérite d'être suivie par les autres États membres dans leur rôle d'état d'envoi, pour souligner leur obligation en termes d'informations sur les éléments essentiels du détachement. Au niveau de l'UE, il serait vivement conseillé d'amender la Directive 91/533 afin d'établir une sanction efficace et dissuasive en cas de non-respect des obligations prévues à l'Article 2 et 4

⁵⁷ Voir Section 4.3, page 110.

de cette Directive et d'étendre son champ d'application à toutes les situations de détachement relevant de la DTD, peu importe la durée prévue du détachement. De plus, le prestataire de services peut être obligé de soumettre des déclarations écrites à ses employés, conformément à la Directive 91/533, aux autorités nationales compétentes dans l'état d'accueil ou l'état d'envoi également.⁵⁸ Au cas où les autorités de l'état d'envoi sont estimées comme principalement responsables, il convient d'établir clairement la coopération avec les autorités compétentes de l'état d'accueil (recommandation 36).

Activités d'inspection et d'exécution

La coopération nationale et transfrontalière

Malgré des progrès considérables, la coopération interne entre les autorités nationales (y compris les partenaires sociaux) responsables du contrôle de la situation au niveau du droit du travail, du droit de la sécurité sociale et du droit fiscal des travailleurs détachés et leurs employeurs comporte de grandes failles. Dans certains États membres il n'y a pas (ou très peu) de coopération systématique, dans d'autres il y a un fossé entre la coopération en théorie et la coopération en pratique. Il en va de même pour la coopération transfrontalière entre les autorités nationales impliquées dans des matières de contrôle/d'exécution liées à la DTD. Le large éventail de fonctions des autorités compétentes des différents pays augmente les difficultés en matière de coopération transfrontalière (ce que l'inspection de travail fait dans un pays relève de la compétence du service des impôts ou du ministère de finances dans un autre). Ainsi, une mise en œuvre/application plus approfondie des initiatives actuelles au niveau de l'UE et au niveau national est nécessaire pour améliorer la coopération nationale ainsi que la coopération transfrontalière (bilatérale) entre différentes inspections⁵⁹ (recommandation 29).

Plusieurs pays ont fait état d'un manque de personnel impliqué dans les tâches de contrôle et d'exécution, entraînant probablement un effet négatif sur la fréquence des contrôles. Pour atteindre ou maintenir un niveau satisfaisant d'exécution effective, proportionnée et dissuasive, il faudrait remédier à ces points faibles par des efforts au niveau national (en embauchant plus d'inspecteurs qualifiés et en fixant des objectifs pour un certain nombre d'inspections, sur la base de l'évaluation des risques) et/ou au niveau de l'UE en déterminant des normes minimales appropriées au sein d'un instrument juridique. L'avantage d'une mesure au niveau de l'UE ce serait de réduire, autant que possible, les grandes différences entre les États membres dans le niveau d'application des droits impartis par la DTD (recommandation 30).

Évaluation du statut du travailleur

⁵⁸ Actuellement, au Luxembourg et en Allemagne (en tant qu'états d'accueil) une obligation de soumettre des certificats conformes à la directive 91/533 CE, ou les contrats de travail par écrit (des copies suffisent) des travailleurs détachés existe. Voir Chapitre 4.3, page 114.

⁵⁹ Voir à cet égard la Recommandation de la Commission du 3 avril 2008 sur une coopération administrative meilleure dans le contexte du détachement de travailleurs dans le cadre de la prestation de services et les communications de la Commission COM (2006) 159 version définitive 4 avril 2006 et COM (2007)304 version définitive, 13 juin 2007. Voir Chapitre 4.6, pages 154-169 pour davantage de détails sur la coopération dans et entre les États membres.

Un problème particulier lié au contrôle des conditions de travail des travailleurs détachés réside dans la difficulté pour les autorités à faire la distinction entre un travailleur (détaché) et un travailleur indépendant (un prestataire de services). Cela peut poser problème même dans des situations purement nationales, mais les choses se compliquent dans le cas des situations transfrontalières, car des systèmes légaux différents peuvent s'appliquer à ces catégories. Quant au système de sécurité sociale applicable, l'État membre sur lequel territoire la personne concernée est normalement employée (ou indépendante) est tenu de (la délivrance du certificat E 101) déterminer la nature du travail en question. Dès lors, dans la mesure où un certificat E 101 établit la présomption que la personne indépendante concernée adhère de manière adéquate au système de sécurité sociale de l'État d'envoi, ceci entraîne une obligation pour l'institution compétente de l'état d'accueil.⁶⁰ Dans le cadre de la DTD c'est l'inverse : l'Article 2(2) DTD stipule que la notion de travailleur est celle qui est applicable en vertu du droit de l'État membre sur le territoire sur lequel le travailleur est détaché. Il convient donc d'établir la nature du travail conformément au droit de l'état d'accueil. Pour des objectifs de droit du travail, le droit néerlandais fournit une présomption légale réfutable de relation de travail. Cette bonne pratique motivera peut-être d'autres États membres à mettre en œuvre des dispositions similaires. Il est à noter, pourtant, qu'une présomption légale similaire (quoique plus stricte) du droit français a été considérée comme une restriction disproportionnée de la libre circulation de services incompatible avec le droit de l'EU.⁶¹

Même si cet arrêt rendait les États membres réticents à adopter une présomption légale d'une relation de travail dans certaines situations de détachement, cette option reste ouverte au législateur européen. Ceci souligne une fois de plus les problèmes que les États membres rencontrent dans le suivi effectif de l'application adéquate de la Directive, sans enfreindre le droit de l'UE.

Reconnaissance et exécution des jugements et décisions étrangers

Malgré des mesures de l'UE qui régissent la reconnaissance et l'exécution des jugements et décisions étrangers, l'exécution des droits impartis par la DTD semble encore s'arrêter à la frontière. Ceci tient en partie à des lacunes juridiques, et à cet égard des mesures supplémentaires devraient être prises au niveau national (par exemple en France) et peut-être aussi au niveau de l'UE pour améliorer la reconnaissance et l'exécution transfrontalière de sanctions prononcées dans le contexte de la DTD (recommandation 32). L'une des meilleures pratiques à mentionner est l'accord entre l'Allemagne et l'Autriche du 31 mai 1998 relatif à l'assistance administrative et juridique réciproque quant aux questions administratives, permettant la mise à exécution transfrontalière de mesures contre les infractions administratives.

⁶⁰ Affaire C-202/97 (Fitzwilliam Executive Search), paragraphe 53, Affaire C-178/97 (Banks), paragraphe 40.

⁶¹ Comme la CE l'interprète dans le contexte du Règlement 1408/71 (maintenant Règlement 883/04). Voir l'Affaire C-255/04, Commission v. France [2006] ECR-I 5251, paragraphes 48-49. Voir aussi. Chapitre 4, pages 157-158 et Chapitre 5, pages 202-203.

Obligation des prestataires de service quant à l'information

Conformément à l'Article 5 DTD, les autorités nationales de l'état d'accueil peuvent imposer des obligations d'information aux prestataires de service comme à d'autres, tels que le destinataire du service et/ou au travailleur détaché. Nous avons étudié les obligations d'ordre légal et d'autorégulation imposées aux prestataires de services, ainsi que les obligations imposées à d'autres acteurs. Nous avons choisi, par contre, de ne pas décrire les exigences éventuelles de fournir des informations sur le détachement des travailleurs dans le pays d'accueil, uniquement en raison de la sécurité sociale et des impôts,⁶² ainsi que celles uniquement destinées au suivi des travailleurs détachés avec une nationalité de pays tiers (comme c'est le cas aux Pays-Bas en partie et entièrement en Italie et au Royaume Uni).⁶³

Exigences quant à la notification

Dans cinq des neuf états d'accueil relevant de la présente étude (la Belgique, le Danemark, la France, l'Allemagne et le Luxembourg) des exigences de notification sont imposées aux prestataires de services étrangers qui détachent des travailleurs pour permettre aux instances publiques responsables d'accomplir leur tâche de contrôle et d'exécution. Ces systèmes semblent être de bonnes pratiques dans la mesure où l'introduction d'un système de notification semble une condition préalable au contrôle et à l'exécution des lois nationales d'application de la DTD (comme mentionné ci-dessus). Ce n'est pas pour autant un instrument sans faille ; en premier lieu, les exigences quant à la notification peuvent poser problème au niveau de la compatibilité avec le droit de l'UE (c'est-à-dire être disproportionnées), en deuxième lieu, beaucoup de parties prenantes nationales signalent que beaucoup de prestataires de services « oublient » de notifier. Néanmoins, toutes les parties prenantes interviewées dans la présente étude semblent convaincues des avantages dudit instrument, tant pour l'exécution que pour l'élaboration d'une politique. En effet, une élaboration de politique efficace est impossible dans l'absence de données fiables sur l'envergure et la nature du phénomène de détachement dans le cadre de la DTD. Là où un système convivial et aisément accessible de notification de détachement de travailleurs est mis en place, comme en Belgique, les avantages semblent être supérieurs aux inconvénients. Les systèmes de notification de Belgique et du Danemark, tels qu'ils sont employés pour le détachement, peuvent également être qualifiés de bonnes pratiques à l'égard des exemptions qu'ils contiennent pour les détachements insignifiants et particuliers ainsi que (Belgique) les exemptions d'exigences d'information plus poussées.⁶⁴ Ces outils peuvent inciter les prestataires de services à faire l'enregistrement. Il se peut qu'on puisse aussi qualifier de bonne pratique ; l'exigence en Allemagne et au Luxembourg de soumettre les documents que les prestataires de services doivent fournir à leurs employés en vertu de la Directive

⁶² La définition de 'travailleur détaché' aux fins de sécurité sociale et droit fiscal ne correspond pas exactement à celle de la DTD. Le chevauchement entre activités de suivi n'est donc pas non plus complet. Une autre étude (à conseiller) serait nécessaire pour une approche globale du suivi des travailleurs détachés (tenant compte aussi de toutes les disciplines juridiques pertinentes).

⁶³ Les exigences d'information ayant comme seul but le contrôle de travailleurs détachés, avec la présence d'une nationalité de pays tiers, relevant plutôt du droit de la migration que du droit du travail national et ne sont donc pas pertinents pour le contrôle et l'exécution de la DTD en tant que telles.

⁶⁴ Veuillez noter que la qualification du système belge comme meilleure pratique se limite à la notification quant au détachement de travailleurs. Voir l'affaire CJE en cours 577/10 relative à la compatibilité avec l'Article 56 du traité de Rome sur la même inscription/notification que pour les indépendants.

91/533 et (Luxembourg) la possibilité donnée aux « joueurs fréquents » de soumettre une « déclaration allégée » peuvent être qualifiés de bonnes pratiques, or ceci mérite une évaluation plus détaillée au vu de la jurisprudence de l'UE.

À cet égard, le développement de documents uniformes au niveau de l'UE quant à certaines exigences d'information est peut-être réalisable (ou insister sur l'usage polyvalent des documents requis dans l'Article 2 et l'Article 4 de la Directive 91/533). En outre, les différences entre États membres avec et sans systèmes de notification, ainsi que le contenu différent des exigences de notification en vigueur, peuvent prêter à confusion et incertitude. Il convient d'étudier s'il serait oui ou non judicieux de coordonner un système de notification au niveau de l'UE en établissant tout au moins les exigences minimales et maximales d'un tel système, notamment quant à l'efficacité et proportionnalité de ce type d'instrument, ainsi que ses conséquences au niveau de la charge administrative. La Directive 2009/52 et les anciennes propositions visant à adopter une Directive de résidence pour travailleurs détachés (recommandations 37 et 38) peuvent servir d'inspiration.⁶⁵

Exigences d'information supplémentaires

Des situations divergentes existent entre les États membres en ce qui concerne les exigences supplémentaires, comme l'obligation de demander une autorisation préalable ou de conserver les documents sur l'emploi à disposition des autorités ou de désigner un représentant, pouvant dans certains cas constituer une violation du droit de l'UE.⁶⁶ À cet égard les États membres devraient échanger leurs meilleures pratiques au sujet d'obligations supplémentaires « équilibrées »⁶⁷ pour les prestataires de services. Au niveau de l'UE, il faudrait établir des documents uniformes sur les obligations d'information des prestataires de services (ou insister sur l'usage polyvalent de déclarations écrites requises dans l'Article 2 et l'Article 4 de la Directive 91/533) (recommandation 39).

Certaines différences entre les États membres surviennent quant à la sévérité et au contenu des sanctions et amendes. À cet égard nous avons estimé (de manière non détaillée) que le Luxembourg semble appliquer les sanctions les plus équilibrées en termes de proportionnalité d'une part, et d'effet dissuasif (ou même de convivialité envers l'entreprise) d'autre part. Le Luxembourg n'impose pas d'amende administrative, mais plutôt un ensemble de règles de conformité. Un autre avantage de ce mode de sanction est d'éviter « au bout du compte » un manque de résultat, tel qu'il a été signalé dans certains autres États membres (Belgique, France, Italie) ayant principalement des sanctions pénales. Dans de tels systèmes une déclaration sur une infraction ne mène pas nécessairement à une poursuite, car souvent le procureur ne semble pas accorder de priorité aux infractions relatives au détachement de travailleurs.

Obligations d'autorégulation des prestataires de services

Dans certains États membres (Danemark, Italie, Royaume Uni) les conventions collectives de travail contiennent des obligations imposées aux prestataires étrangers de services pour fournir des reçus de paiement et des contrats de travail ou des documents quant aux conditions de travail à la demande de la section locale du

⁶⁵ Voir COM (1999) 3 et COM (2000) 271.

⁶⁶ Voir Chapitre 4, pages 117-123, aussi quant aux plaintes portées par SOLVIT, pages 151-153.

⁶⁷ Des règles ni excessivement strictes (disproportionnées) ni trop souples (sans effet dissuasif).

syndicat. Il va de soi qu'on peut applaudir ce genre d'initiatives et les échanger comme bonnes pratiques et comme outil pour améliorer le respect de la DTD au niveau de la CCT (recommandation 40) à condition que le contenu des mesures de CCT ne soit pas disproportionné ni ne se trouve en violation du droit de l'UE (donc à condition qu'elles ne soient ni trop rigides ni trop flexibles).

Mécanismes de recours pour prestataires de service

Les prestataires de services étrangers peuvent contacter les points de contact nationaux du Réseau de Résolution des Problèmes du Marché Intérieur (SOLVIT) en adressant des réclamations sur la manière dont les autorités appliquent et exécutent les règles sur le détachement de travailleurs. Il semble que ce système de mécanisme de recours ait fonctionné de manière satisfaisante, surtout en Pologne, mais dans la majorité des États membres participant à cette étude, on a constaté qu'on ne connaît pas très bien ce mécanisme et qu'il est peut-être sous-employé. De plus, il s'est avéré fort difficile dans plusieurs États membres d'avoir accès à des informations sur la nature des réclamations de la part des agences SOLVIT.

Obligations du destinataire des services

Obligations d'information imposées aux destinataires des services

Dans certains pays (la Belgique, le Danemark, quant à certains secteurs à risque) les destinataires de services doivent vérifier si les prestataires étrangers de services, notamment dans leur rôle d'agence étrangère de sous-traitance/de travail intérimaire ont respecté leurs devoirs de notification. En cas de non-respect, le destinataire/l'entreprise utilisatrice doit communiquer cela à l'agence nationale compétente. Si le destinataire du service signale le non-respect, il est libéré de responsabilité mais peut recevoir une amende. Certaines obligations d'information du destinataire du service sont aussi en place au niveau de la CCT, notamment dans le secteur de la construction, par exemple en raison de la mise en œuvre de la Directive 92/57/CEE relative à la sécurité minimale sur les sites de construction. Au vu du problème de non-inscription de prestataires de services constaté dans plusieurs États membres, il est compréhensible qu'on accorde une certaine coresponsabilité au destinataire du service. Donc, pour augmenter l'efficacité de ces systèmes de notification, ces initiatives peuvent être applaudies et échangées comme une bonne pratique, à savoir comme outil pour améliorer le respect de la DTD, y compris au niveau de la CCT. Toutefois, il convient d'étudier plus en détail la compatibilité avec le droit de l'UE quant à l'efficacité et la proportionnalité d'un tel outil ainsi que ses conséquences en matière de charge administrative.

Responsabilité du destinataire du service (ou « équivalents fonctionnels »)

Dans cinq des neuf pays d'accueil de notre étude (Belgique, France, Allemagne, Italie, les Pays-Bas) des mécanismes légaux et parfois des mécanismes d'autorégulation de responsabilité finale sont en place, notamment des systèmes de responsabilité conjointe et solidaire existent pour éviter le non-paiement de salaires (excepté en Belgique), de cotisations de sécurité sociale (tous) et des charges fiscales (Belgique, France, Pays-Bas et en partie Danemark).

Dans certains pays, plusieurs outils ont été élaborés, soit pour éviter une possibilité de responsabilité entre les parties concernées, soit pour sanctionner les parties qui ne

respectent pas les règles de jeu. Les outils préventifs peuvent vérifier la fiabilité générale de la partie sous-traitante et/ou garantir le paiement de salaires, de cotisations de sécurité sociale et l'impôt sur les salaires. Les parties qui ne respectent pas les règles des dispositifs de responsabilité disponibles sont susceptibles d'être sanctionnées par un nombre d'*outils répressifs*, à savoir : obligations de paiements rétroactifs (Danemark, France, Italie, Pays-Bas), amendes (Belgique, Danemark, France), et/ou des sanctions alternatives ou supplémentaires (Allemagne, France, Italie). Dans d'autres états d'accueil (notamment Suède, Luxembourg et dans un certain sens aussi Royaume Uni) des mesures alternatives (équivalents fonctionnels) visant les mêmes objectifs existent.

Pour une description détaillée des systèmes de responsabilité dans les cinq pays mentionnés, nous renvoyons à l'étude sur la « *Liability in subcontracting processes in the European construction sector* » publiée par la Fondation européenne pour l'amélioration des conditions de vie et de travail (Fondation Dublin) en 2008. L'un des constats de cette étude était que les règles sur la responsabilité dans les États membres de l'étude manquent en grande partie d'avoir un impact efficace sur les situations frauduleuses et sur les abus de travailleurs détachés dans des situations transfrontalières de sous-traitance et de travail intérimaire.

Il faudrait envisager des études plus poussées pour déterminer si des normes minima pourraient être adoptées au niveau de l'EU sur les obligations (y compris sur la responsabilité) des destinataires du service dans le cadre de la DTD, surtout sur les équivalents fonctionnels en place dans les États membres qui ne relèvent pas de la présente étude (recommandation 41).

Instruments de soutien/recours à disposition des travailleurs détachés

À ce titre nous avons en premier lieu étudié les voies légales de recours des travailleurs détachés et/ou de leurs représentants pour faire valoir les droits impartis par la DTD. L'Article 6 de la DTD prévoit que pour faire valoir ses droits, aux conditions de travail, garantis par l'Article 3 de la DTD le travailleur détaché doit pouvoir intenter une action en justice dans l'État membre d'accueil, sans préjudice, le cas échéant, de la faculté d'intenter une action en justice dans un autre État, comme celui où il accomplit habituellement son contrat de travail, ceci conformément aux conventions/ règlements d'ordre international en matière de compétence judiciaire. Ainsi, tous les États membres ont dû s'assurer que les travailleurs détachés sur leur pays, relevant de la Directive, disposaient de la faculté d'intenter une action en justice pour faire valoir leurs droits dans le territoire sur lequel ils ont été détachés. L'Article 6 de la DTD a été mis en œuvre explicitement dans tous les États membres de cette étude, à l'exception du Royaume Uni. Au Royaume Uni, les situations de détachement étudiées et les droits émanant de la DTD n'ont pas été clairement définis dans le droit national et la clause sur la compétence judiciaire de l'Article 6 de la Directive n'a donc pas été mise en œuvre correctement. Néanmoins, les travailleurs de l'UE ⁶⁸ détachés au Royaume Uni peuvent porter plainte devant la Cour du Travail pour, par exemple, licenciement abusif, non-paiement du salaire minimum, discrimination

⁶⁸ Il n'est pas clair si ceci implique l'exception des travailleurs avec une nationalité de pays tiers.

fondée sur le handicap, étant donné qu'ils bénéficient de la même protection que les travailleurs non-détachés au Royaume Uni.⁶⁹

Qualité pour agir, des partenaires sociaux et des travailleurs détachés individuels

Plusieurs États membres (Belgique, France, Pays-Bas) n'ont pas seulement mis en œuvre une clause sur la compétence judiciaire pour le travailleur détaché individuel, mais aussi *indépendamment du travailleur individuel* pour des organisations représentant les travailleurs et les employeurs, sans préjudice du droit du travailleur détaché d'intenter lui-même une action en justice, et de se joindre ou d'intervenir dans une action en justice. Comme les syndicats (et les associations d'employeurs) dans l'état d'accueil peuvent avoir un intérêt indépendant à faire valoir les normes du droit du travail de l'état d'accueil par rapport aux prestataires étrangers de service, ceci peut être qualifié de bonnes pratiques méritant d'être suivie par d'autres États membres. Au niveau de l'UE, un amendement de l'Article 6 DTD pour donner aux partenaires sociaux la possibilité de disposer de la qualité d'agir de manière obligatoire serait opportun. En outre, la formulation de l'Article 6 de la DTD doit aussi souligner que les États membres sont obligés de donner la qualité pour agir aux travailleurs détachés individuels devant les tribunaux dans l'état d'accueil. À l'heure actuelle, ceci n'est pas le cas en Suède.

Dans ce contexte le droit indépendant d'intenter des actions en justice est assez efficace et son usage fréquent dans la pratique du fonds de congés allemand ULAK est également intéressant. Si ce n'est pas déjà fait, les États membres pourraient envisager la possibilité, et la valeur ajoutée, de permettre à un acteur/une autorité compétente d'intenter une action en justice contre un employeur qui ne respecterait pas les règles (par exemple pour le recouvrement de salaires impayés) (recommandation 42).

Accès des travailleurs détachés à l'assistance juridique

Les travailleurs détachés (même s'ils ne sont pas domiciliés ou résidents dans l'état d'accueil) ont égalité d'accès aux mécanismes d'assistance juridique prévus par la loi en Belgique, France, Allemagne, Pays-Bas, Luxembourg et Suède, à condition qu'ils soient ressortissants de l'UE ou qu'ils résident régulièrement ou sont domiciliés dans un autre Etat membre de l'UE (à l'exception du Danemark). Néanmoins, conformément aux principes généraux, au Royaume Uni dans les affaires d'emploi, il n'y a pas d'assistance juridique disponible pour les travailleurs qui y sont détachés. Les travailleurs détachés en Roumaine n'ont pas non plus d'accès à l'assistance juridique, à l'exception de l'assistance juridique que peut fournir le syndicat. Même si ces résultats sont conformes au droit de l'UE (notamment à la directive sur l'assistance juridique) on pourrait conseiller, par le biais d'une Communication UE par exemple, de fournir un accès des travailleurs (détachés) à l'assistance juridique dans les pays où elle n'est pas disponible actuellement (recommandation 43).

Non-utilisation de la clause sur la compétence judiciaire par les travailleurs détachés

Dans les États membres d'accueil il semble qu'à l'heure actuelle le droit d'intenter des actions en justice n'a pratiquement jamais, voire jamais, été utilisé par les

⁶⁹ Voir <http://www.thompsons.law.co.uk/text/10640005.htm>

travailleurs détachés ou leurs représentants (sauf éventuellement par l'Allemagne, voir Annexe II et III). Quand on compare ce fait aux témoignages convaincants (bien qu'anecdotiques) de cas (abusifs) de non-conformité, comme signalés dans les rapports nationaux (voir la partie 3.5 et l'Annexe I), force est de constater que la clause sur la compétence judiciaire ne suffit pas à elle seule comme recours efficace. Plusieurs rapports nationaux ont abouti à cette conclusion : en pratique, la majorité des travailleurs détachés deviennent actifs seulement quand ils n'ont plus d'autres moyens. Ceci est valable pour des cas de graves accidents du travail (susceptibles également d'inciter des survivants et/ou des collègues choqués à prendre des mesures) ou quand aucun salaire n'est payé et que les employés ne peuvent même pas payer leurs frais de subsistance. Dans ces derniers cas de figure, l'employeur direct a souvent disparu ou ne peut plus être tracé.

Les principales causes de cette attitude passive et non-assertive des travailleurs détachés se trouvent dans leur position socioéconomique et sociétale souvent vulnérable ou particulière. Par conséquent, le problème est principalement dû à d'autres raisons qu'au manque de mise en œuvre, d'application ou d'exécution de la DTD au niveau national ou de la DTD en tant que telle. Cela ne signifie pas pour autant que rien ne peut être fait d'un point de vue légal. Dans la mesure où des problèmes de procédure sont détectés (dans certains rapports nationaux), il convient certainement de faire des efforts pour les éliminer. Néanmoins, le point clé à souligner dans ce contexte est le rôle indispensable des syndicats qui, comme on l'a démontré dans les parties 3.2 et 4.5, essaient de contacter les travailleurs détachés et de leur « donner des pouvoirs », avec l'aide d'autres acteurs, sur leurs lieux de travail. Plusieurs rapports sur des grèves sauvages et des grèves organisées pour les travailleurs détachés méritent d'être nommés. Les efforts pour syndiquer les travailleurs détachés, par contre, n'ont pas eu de franc succès, principalement pour des raisons non-juridiques (manque d'intérêt / peur / méfiance par rapport aux syndicats en raison de mauvaises expériences / mauvaise image dans le pays d'origine / frais de l'affiliation). Néanmoins, des signes encourageants, comme la sensibilisation croissante, notamment des travailleurs détachés polonais, montrent que les efforts des syndicats doivent être soutenus et non pas abandonnés par manque de moyens financiers (comme plusieurs rapports l'ont également indiqué). Nous estimons donc qu'il est important de souligner le besoin à long terme de promouvoir et soutenir les initiatives des syndicats (et/ou des partenaires sociaux) dans ce domaine (recommandation 44).

Mécanismes de recours

Aucun des pays étudiés ne dispose de mécanismes de recours particuliers permettant aux travailleurs détachés de déposer une plainte sur le non-respect de la DTD. Les travailleurs détachés peuvent employer les mêmes voies de recours que tout autre travailleur de ces pays, par exemple contacter les syndicats ou les services d'inspection du travail au sujet de leur réclamation. Ces mécanismes de recours disponibles selon la législation nationale générale peuvent, néanmoins, ne pas être considérés compréhensibles par ou accessibles aux travailleurs détachés (toutefois le rôle d'ACAS dans le litige *collectif* Lindsey Oil Refinery ne doit pas, pour autant, être sous-estimé). En pratique, donc, la plupart des travailleurs détachés ne se plaignent pas de non-conformité ni de situations abusives, dans certains parce qu'ils ont peur de le faire ou parce qu'ils craignent de perdre leur emploi. Il serait judicieux de remédier au manque de mécanismes de recours mandatés au niveau national. Au niveau de

l'UE, aussi, il serait recommandable de faciliter et/ou d'introduire un mécanisme de recours axé spécialement sur les travailleurs détachés (recommandation 45).

4. Remarques finales

Dans le présent document de synthèse de notre étude comparative, fondée sur douze rapports nationaux, nous avons seulement pu esquisser très brièvement nos recherches approfondies sur les problèmes qui existent dans la mise en œuvre, l'application et l'exécution de la Directive (voir les Chapitres 2, 3 et 4). Pourtant, nous avons pu intégrer dans cette synthèse la plus grande partie de l'analyse des causes des problèmes, ainsi que nos recommandations principales, y compris la classification des meilleures pratiques (voir Chapitre 5).

En général, beaucoup de nos recommandations se résument à clarifier et appliquer plus précisément les notions et les normes de la DTD pour améliorer l'impact pratique de la Directive. L'idéal serait de procéder à cette clarification surtout au niveau de l'UE, avec une application plus précise et correcte au niveau national. Quant aux problèmes d'application et d'exécution de la DTD, nous préconisons également l'élaboration de nouveaux instruments juridiques ou politiques. Beaucoup peut être fait au niveau national, mais si l'on considère le principe d'efficacité ancré dans le Traité de Rome, un travail juridique (supplémentaire) au niveau européen semblerait indispensable.

Vergleichende Studie der rechtlichen Aspekte der Entsendung von Arbeitnehmern im Rahmen der Erbringung von Dienstleistungen in der Europäischen Union

für die Europäische Kommission
Kontraktnummer VC/2009/0541

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ZUSAMMENFASSUNG

1. Hintergrund und Fragestellung der Untersuchung

Die Stellung von Arbeitnehmern, die im Rahmen der Erbringung von Dienstleistungen in einen anderen Mitgliedstaat entsandt werden, ist seit geraumer Zeit ein europäisches Anliegen. Die Richtlinie für die Entsendung von Arbeitnehmern (im Folgenden „Entsenderichtlinie“ genannt), die am 16. Dezember 1996 verabschiedet wurde, ist eins der konkreten Ergebnisse dieses Anliegens. Die Entsenderichtlinie hat das Ziel, die Ausübung des Rechts der Unternehmen auf freien Dienstleistungsverkehr beim Angebot von grenzüberschreitenden Dienstleistungen gemäß Artikel 56 AEUV (ex-Artikel 49 EGV) mit der Notwendigkeit abzustimmen, ein Klima des fairen Wettbewerbs und die Wahrung der Rechte der Arbeitnehmer sicherzustellen (Präambel Paragraph 5).

Die Europäische Kommission hat die Einführung und Durchsetzung dieser Richtlinie regelmäßig kontrolliert, um beurteilen zu können, ob die Ziele der Entsenderichtlinie erreicht werden. Eine umfassende Kontrolluntersuchung, die 2006 von der Europäischen Kommission¹ veranlasst wurde, führte zu dem Ergebnis, dass das Hauptdefizit der Richtlinie, unter Umständen sogar alle Defizite, auf eine Reihe von Problemen zurückgeführt werden können, die sich auf ihre Einführung, Anwendung und Durchsetzung in der Praxis beziehen.

Im Juli 2009 startete die Europäische Kommission das Pilotprojekt ‚Arbeits- und Lebensbedingungen von entsandten Arbeitnehmern‘. Als Teil dieses Projekts wurden zwei Forschungsprojekte in Auftrag gegeben, die im Dezember 2009/Januar 2010 gestartet wurden. Das eine befasst sich mit den wirtschaftlichen und sozialen Auswirkungen des Phänomens der Entsendung von Arbeitnehmern in der Europäischen Union (VT/2009/62). Das andere Forschungsprojekt (VT/2009/63) beschäftigt sich mit den rechtlichen Aspekten der Entsendung von Arbeitnehmern im Kontext der Erbringung von Dienstleistungen in der Europäischen Union. Hieraus resultiert die vorliegende Studie.

Ziele, Methode und Grenzen dieser Studie

Allgemeines

Diese vergleichende Studie basiert auf 12 nationalen Studien², die die Fragen und Probleme, die in der praktischen Anwendung der Gesetzgebung zur Entsendung von Arbeitnehmern auftreten, sowie ihre Durchsetzung in der Praxis untersucht haben. Die Studie untersucht nicht nur die Rolle der Behörden der Mitgliedstaaten (in erster Linie der Arbeitsaufsichtsbehörden) bei der angemessenen Durchführung der Richtlinie, sondern auch die entsprechenden Aktivitäten der Sozialpartner. Zu diesem Zweck

¹ KOM (2006) 159 und das begleitende Arbeitsdokument der Dienststellen SEK (2006) 439 sowie die Folgemitteilung KOM (2007) 304 „Entsendung von Arbeitnehmern im Rahmen der Erbringung von Dienstleistungen: Vorteile und Potenziale bestmöglich nutzen und dabei den Schutz der Arbeitnehmer gewährleisten“ und das begleitende Arbeitsdokument der Dienststellen SEK (2007) 747.

² Nationale Experten waren: Belgien: Filip van Overmeiren; Dänemark: Lynn Roseberry; Estland: Merle Muda; Frankreich: Barbara Palli; Deutschland: Monika Schlachter; Italien: Giovanni Orlandini; Großbritannien: Keith Ewing; Luxemburg: Guy Castegnaro und Ariane Claverie; Niederlande: Mijke Houwerzijl; Polen: Marek Pliszkiewicz; Rumänien: Christina Maria Ana; Schweden: Kerstin Ahlberg

haben die nationalen Berichtersteller strukturierte Interviews ausgearbeitet sowie Gesetze und Fallrecht analysiert. Die nationalen Berichtersteller wurden hierbei durch einen detaillierten Fragebogen unterstützt, der von Forschungsleitern in enger Zusammenarbeit mit der Europäischen Kommission und den Berichterstellern selbst erarbeitet wurde.

Obwohl in allen Ländern, die in dieser Studie behandelt werden, eine systematische Überprüfung der Einführung, Anwendung und Durchsetzung der Entsenderichtlinie durchgeführt wurde, sollte hier angemerkt werden, dass die Ergebnisse einiger Länderstudien öfter hervorgehoben werden als andere. Für diese ungleiche Verteilung der Aufmerksamkeit gibt es zwei Gründe. Da erstens die Entsenderichtlinie sich an Länder in ihrer Rolle als Gastland richtet, haben Länder mit einer überwiegenen Rolle als Entsender weniger Erfahrung mit der Anwendung und Durchsetzung der Richtlinie. Die zweite Begründung bezieht sich auf das Ausmaß, mit dem gewisse Systeme sich von anderen unterscheiden in Hinblick auf ihre Methode der Einführung, ihre Art der Anwendung und/oder ihre Überwachungs- und Kontrollwerkzeuge bzw. bezüglich der in ihrem Durchsetzungssystem beteiligten Akteure.

Ziele

Diese Studie hat drei Hauptziele:

- (1) Eine umfassende Übersicht über die bestehenden Probleme mit der Einführung und Anwendung der Richtlinie in der Praxis zu erstellen;
- (2) eine umfassende Übersicht über die bestehenden Probleme bei der Durchsetzung der durch diese Richtlinie übertragenen Rechte zu erstellen;
- (3) die Ursachen der identifizierten Probleme auszuwerten und Vorschläge für Lösungen zu unterbreiten. Im Besonderen sollte die Forschungsstudie untersuchen, ob Schwierigkeiten und Probleme bei der Einführung, Anwendung und Durchsetzung der Entsenderichtlinie verursacht werden durch:
 - Die nationale Methode der Einführung und/oder die nationale Anwendung der Richtlinie;
 - das nationale System der Durchsetzung;
 - die Richtlinie als solche; und/oder
 - unzureichende länderübergreifende Kooperation (bzw. deren Nichtvorhandensein);
 - andere Gründe.

In Bezug auf das letztgenannte Ziel ist zu beachten, dass Analyse und Empfehlungen die persönlichen Ansichten der Autoren darstellen und nicht als offizielle Position der Europäischen Kommission anzusehen sind.

Auswahl der Länder

Der Auswahl der in diese Studie einbezogenen Länder lagen fünf Aspekten zugrunde:

- 1) Die Übersicht sollte Länder mit einem hohen Entsende-Aufkommen einschließen, sowohl als Empfangs- als auch als Entsendestaat.
- 2) Die Übersicht sollte eine Bandbreite an Ländern mit niedrigen und hohen Löhnen abdecken.
- 3) Die Übersicht sollte eine Bandbreite an Sozialmodellen abdecken.

- 4) Die Übersicht sollte solche Länder abdecken, die spezifische Probleme hatten mit der Entsendung von Mitarbeitern als solches und/oder der Einführung der Richtlinie, wie durch öffentlich bekannt gewordene Fälle dokumentiert.
- 5) Die Übersicht sollte relevante Beispiele von Best Practices abdecken – z. B. im Bereich der Vergleichbarkeit von Arbeitsbedingungen und/oder der Kooperation zwischen relevanten Akteuren.

Die Länder, die zu dieser vergleichenden Studie beigetragen haben, umfassten fünf vorwiegende Gastländer (Importeure von durch entsandte Arbeitnehmer erbrachten Dienstleistungen), und zwar die von der sozialen Marktwirtschaft geprägten kontinentaleuropäischen Länder Italien (IT) und Luxemburg (LU), die nordeuropäischen Länder Dänemark (DK) und Schweden (SE) und das angelsächsische Großbritannien (UK). Die von der sozialen Marktwirtschaft geprägten kontinentaleuropäischen Länder Belgien (BE), Deutschland (DE), Frankreich (FR) und die Niederlande (NL) spielen eine wichtige Rolle sowohl als Entsende- wie auch als Empfangsstaaten. Drei überwiegend entsendende Länder (Exporteure von durch entsandte Arbeitnehmer erbrachten Dienstleistungen) wurden ebenfalls untersucht, um das Bild zu vervollständigen: die zentral- und osteuropäischen Länder Estland (EE), Polen (PL) und Rumänien (RO). Diese Auswahl bedeutete, dass es möglich war, die unterschiedlichen Einführungssysteme und Sozialmodelle aus der Perspektive sowohl der Entsende- als auch der Empfangsstaaten zu betrachten. Darüber hinaus wurden signifikante Vorfälle wie auch relevante Praktiken aus beiden Blickrichtungen einbezogen.

Beschränkung auf zwei Industriezweige

Ein Teil der Studie bezieht sich auf das Gesetz und den Rechtsschutz. Dies ist in hohem Maße abhängig von der Gesetzgebung und anderen allgemein anzuwendenden Richtlinien. Schutz durch Tarifverträge, Durchsetzung durch und Kooperation zwischen Sozialpartner(n) und praktische Anwendung der Richtlinie könnten allerdings branchenspezifisch sein. In Interviews mit den Sozialpartnern und den Regierungsbehörden ergab sich deswegen die Notwendigkeit, eine Konzentration auf bestimmte Industriezweige vorzunehmen. Obwohl nationale Berichtersteller ermutigt wurden, Einzelfälle oder Best Practices aus einer anderen Branche hinzuzufügen, waren sie angehalten, die systematische Recherche auf einige spezifische Industriezweige zu beschränken. Ausgewählt wurden die Baubranche und die Entsendung durch Leiharbeitsunternehmen. Dieser Auswahl lagen verschiedene Faktoren zugrunde:

- 1) Diese Branchen zeigen spezifische Merkmale in Bezug auf die Entsendung;
- 2) sie haben eine hohe Relevanz in der Praxis;
- 3) sie sollten einen umfassenden Überblick über die verschiedenen Entsendemodalitäten geben können.

Beschränkung auf Rechtsfragen

Obwohl diese Studie das Ziel hat, einen Überblick über die Anwendung und Durchsetzung der Entsenderichtlinie in der Praxis zu liefern, handelt es sich nicht um eine empirische Studie. Wo Informationen zur Effektivität des Systems geliefert werden, basieren diese auf Selbsteinschätzungen der jeweiligen nationalen Akteure.

Wichtigste Merkmale der Entsenderichtlinie

Persönlicher Geltungsbereich der Richtlinie

Die Entsenderichtlinie bestimmt auf Gemeinschaftsebene für das Gastland eine Reihe von nationalen, verbindlichen Vorschriften von allgemeinem Interesse, die für entsandte Arbeitnehmer angewendet werden müssen. Damit definiert sie einen harten Kern von klar definierten Arbeits- und Beschäftigungsbedingungen für einen Mindestschutz der Arbeitnehmer (wie festgelegt durch Artikel 3(1) a – g), die von den Dienstleistungserbringern in den Gastgeber-Mitgliedstaaten befolgt werden müssen.

Die Richtlinie gilt für Unternehmen mit Sitz in einem Mitgliedstaat, die im Rahmen der länderübergreifenden Erbringung von Dienstleistungen Arbeitnehmer in das Hoheitsgebiet eines anderen Mitgliedstaates entsenden (ausgenommen Schiffsbesatzungen von Unternehmen der Handelsmarine, siehe Artikel 1(2)). Laut Artikel 1(3) umfasst die Richtlinie drei länderübergreifende Situationen, und zwar:

1. Entsendung im Rahmen eines Vertrags, der zwischen dem entsendenden Unternehmen und dem Dienstleistungsempfänger geschlossen wurde;
2. Entsendung in eine Niederlassung oder ein der Unternehmensgruppe angehörendes Unternehmen;
3. Entsendung durch ein Leiharbeitsunternehmen in ein verwendendes Unternehmen, das in einem anderen Mitgliedstaat tätig ist als das entsendende Unternehmen.

Für alle drei Situationen gilt die Maßgabe, dass für die Dauer der Entsendung ein Arbeitsverhältnis zwischen dem entsendenden Unternehmen und dem entsandten Arbeitnehmer besteht.

Im Sinne der Richtlinie gilt als entsandter Arbeitnehmer jeder Arbeitnehmer, der für einen begrenzten Zeitraum seine Arbeitsleistung im Hoheitsgebiet eines anderen Mitgliedstaates als demjenigen erbringt, in dessen Hoheitsgebiet er normalerweise arbeitet (Artikel 2(1)). Ferner legt die Richtlinie fest, dass Unternehmen mit Sitz in einem Nichtmitgliedstaat keine günstigere Behandlung zuteilwerden darf als Unternehmen mit Sitz in einem Mitgliedstaat (Artikel 1(4)).³

Hauptanwendungsbereich der Entsenderichtlinie

Der harte Kern der zu beachtenden Vorschriften umfasst, wie in Artikel 3(1) der Richtlinie festgelegt, die folgenden Schutzbereiche:

- (a) Höchstarbeitszeiten und Mindestruhezeiten;
- (b) bezahlter Mindestjahresurlaub;
- (c) Mindestlohnsätze einschließlich der Überstundensätze; dies gilt nicht für die zusätzlichen betrieblichen Altersversorgungssysteme;
- (d) Bedingungen für die Überlassung von Arbeitskräften, insbesondere durch Leiharbeitsunternehmen;
- (e) Sicherheit, Gesundheitsschutz und Hygiene am Arbeitsplatz;

³ Siehe auch Randnummer 20 der Richtlinie, die angibt, dass die Richtlinie weder die von der Gemeinschaft mit Drittländern abgeschlossenen Vereinbarungen beeinflusst noch die Gesetze der Mitgliedstaaten in Bezug auf den Zugang zu ihrem Hoheitsgebiet durch Dienstleistungsanbieter aus Drittländern. Die Richtlinie ist außerdem vorurteilsfrei gegenüber nationalen Gesetzen bezüglich des Eintritts, des Aufenthalts und des Zugangs zu Beschäftigung durch Arbeitnehmer aus Drittländern.

- (f) Schutzmaßnahmen im Zusammenhang mit den Arbeits- und Beschäftigungsbedingungen von Schwangeren und Wöchnerinnen, Kindern und Jugendlichen;
- (g) Gleichbehandlung von Männern und Frauen sowie andere Nichtdiskriminierungsbestimmungen.

Diese Vorschriften müssen entweder gesetzlich festgelegt werden und/oder im Fall von Tätigkeiten in der Baubranche (wie im Anhang aufgeführt) durch Tarifverträge bzw. durch Schiedssprüche, die für allgemein verbindlich erklärt wurden.⁴ Mitgliedstaaten dürfen wählen, ob sie Vorschriften, die in Tarifverträgen festgelegt sind, im Fall von anderen Tätigkeiten als Bauarbeiten einführen (gemäß Artikel 3(10), zweiter Unterabsatz). Sie dürfen außerdem, unter Einhaltung des Vertrags, die Arbeits- und Beschäftigungsbedingungen auf andere Bereiche anwenden als solche, auf die sich in der Richtlinie für den Fall der Vorschriften im Bereich der öffentlichen Ordnung bezogen wird (gemäß Artikel 3(10), erster Unterabsatz).⁵

Informations-, Überwachungs- und Rechtsprechungsmaßnahmen in der Entsenderichtlinie

Um die praktische Wirksamkeit des eingeführten Systems sicherzustellen, regelt Artikel 4 der Richtlinie die Zusammenarbeit im Informationsbereich zwischen den Mitgliedstaaten. Es werden Verbindungsbüros benannt, die die Arbeits- und Beschäftigungsbedingungen überwachen und als Berichterstatter und Kontaktstellen dienen für Behörden in anderen Mitgliedstaaten, für Unternehmen, die Arbeitnehmer entsenden, und für die entsandten Arbeitnehmer selbst. Gemäß Artikel 4(3) der Richtlinie ergreift jeder Mitgliedstaat außerdem geeignete Maßnahmen, um die Informationen über die Arbeitsbedingungen, wie festgelegt in Artikel 3, allgemein zugänglich zu machen. Darüber hinaus ist in Artikel 5 festgelegt, dass die Mitgliedstaaten für den Fall der Nichteinhaltung der Entsenderichtlinie geeignete Maßnahmen vorsehen. Sie stellen insbesondere sicher, dass den Arbeitnehmern und/oder ihren Vertretern für die Durchsetzung der sich aus dieser Richtlinie ergebenden Verpflichtungen geeignete Verfahren zur Verfügung stehen. Die Richtlinie umfasst außerdem eine Bestimmung zur gerichtlichen Zuständigkeit in Artikel 6, die besagt, dass eine Klage in dem Mitgliedstaat erhoben werden kann, in dessen Hoheitsgebiet der Arbeitnehmer entsandt ist oder war.

⁴ Siehe in diesem Zusammenhang auch Artikel 3(8), der Vorsorge trifft für weitere Möglichkeiten im Falle des Nichtvorhandenseins eines Systems, mit dem Tarifvereinbarungen für allgemeingültig erklärt werden.

⁵ Artikel 3(10). Für weitere Details siehe auch die Mitteilung der Kommission zur Einführung der Richtlinie 96/71/EG, KOM (2003), 458 endgültig, 25.7.2003.

2. Rechtsrahmen der Entsenderichtlinie: Internationales Privatrecht und nationales Arbeitsrecht

In Kapitel 2 beschreiben wir den rechtlichen Hintergrund, vor dem die Entsenderichtlinie agiert. Wir halten dies aus folgenden Gründen für notwendig:

- um zu verdeutlichen, dass die Entsenderichtlinie nicht isoliert ausgelegt werden kann, sondern in Zusammenhang mit dem Internationalen Privatrecht (IPR) gesehen werden muss;
- um ein tieferes Verständnis des Einflusses der Entsenderichtlinie auf das nationale System zu fördern
- um problematische Bereiche in der Interaktion zwischen den Systemen zu identifizieren, die jedes Instrument für die Anwendung und Durchsetzung der Entsenderichtlinie berücksichtigen muss, um effektiv sein zu können.

Die Entsenderichtlinie und das auf den Arbeitsvertrag anzuwendende Gesetz

Die Entsenderichtlinie befasst sich mit dem Recht, das auf das Arbeitsverhältnis von entsandten Arbeitnehmern anzuwenden ist. Zu großen Teilen ist diese Thematik ebenfalls von den Vorschriften des Internationalen Privatrechts (IPR) erfasst. Die Entsenderichtlinie erkennt diese Überschneidung an, indem sie in ihrer Präambel⁶ ausdrücklich auf das Übereinkommen von Rom von 1980 verweist. Impliziter spielt das Internationale Privatrecht eine Rolle in Artikel 3(1), wo erklärt wird, dass „Mitgliedstaaten dafür sorgen, dass *unabhängig von dem auf das jeweilige Arbeitsverhältnis anwendbare Recht* (Hervorhebung durch AH/MH), die in Artikel 1 Absatz 1 genannten Unternehmen den in ihr Hoheitsgebiet entsandten Arbeitnehmern bezüglich der nachstehenden Aspekte die Arbeits- und Beschäftigungsbedingungen garantieren...“. Damit wird klar gemacht, dass das auf den Arbeitsvertrag anwendbare Recht durch das Internationale Privatrecht (gegenwärtig Rom I Verordnung) geregelt wird, die Entsenderichtlinie überstellt jedoch – falls notwendig – den Mindestschutz der Gesetze des Gaststaates dem Schutz, der bereits gemäß dem Recht gewährleistet wird, das auf den Vertrag kraft der Rom I Verordnung angewandt wird.⁷

Die IPR-Gesetze sind auf den Einzelfall abgestimmt. Artikel 8 der Rom I Verordnung versucht zu identifizieren, welches Recht am engsten mit dem einzelnen Arbeitsvertrag in Zusammenhang steht unter Berücksichtigung der Umstände des Falles.⁸ Der Ort der Arbeitsausübung spielt bei dieser Festlegung eine wichtige Rolle, ist aber nicht immer entscheidend. Im Besonderen bleibt der Vertrag im Fall von kurzzeitigen Entsendungen der Gesetzgebung des *gewohnheitsmäßigen* Arbeitsortes unterworfen. Diese Vorschrift stellt ein bestimmtes Maß an Kontinuität sicher im Hinblick auf das auf den einzelnen Vertrag anwendbare Recht. Dies sollte das Interesse ausgleichen, alle angestellten Arbeitnehmer innerhalb eines Hoheitsgebiets eines bestimmten Staates in vollem Umfang und ausschließlich der Gesetzgebung dieses Staates zu unterwerfen. Der gewohnheitsmäßige Ort der Arbeitsausübung kann oftmals mit dem Herkunftsland des Arbeitnehmers übereinstimmen, aber juristisch

⁶ Siehe Präambel Paragraph 6-11. Siehe auch Fußnote 3 des Kapitels 2 im vergleichendem Studie, S. 14.

⁷ Vergleiche hinsichtlich der Beziehung zwischen der Rom I Verordnung und der Entsenderichtlinie: Grünbuch zur Umwandlung des Übereinkommens von Rom aus dem Jahr 1980 über das auf vertragliche Schuldverhältnisse anwendbare Recht in ein Gemeinschaftsinstrument sowie seine Aktualisierung KOM (2002) 654 endgültig S. 36.

⁸ Grünbuch Rom I KOM (2002) 654, S. 35 ff.

sind dies verschiedene Anknüpfungen. Daher ist es wichtig zu erkennen, dass die Anwendung des Gesetzes des Landes, in dem ein entsandter Arbeitnehmer normalerweise arbeitet, auf den individuellen Arbeitsvertrag auf der Rom-Konvention und der Rom I Verordnung basiert und grundsätzlich nicht auf den Vorschriften, die den Binnenmarkt regeln.⁹ Darüber hinaus sollte beachtet werden, dass gemäß dem System der Rom I Verordnung der Ort der Niederlassung des Arbeitnehmers als solches nicht ausreicht, um den entsandten Arbeitnehmer der Gesetzgebung des Entsendestaates zu unterwerfen. Jedoch ist der Ort der Niederlassung wesentlich für die Anwendung der Vorschriften des Binnenmarktes. Um von der Freiheit, Dienste anbieten zu können, zu profitieren, muss der Arbeitgeber seine „Niederlassung“ in einem Mitgliedstaat haben, das heißt, dort auf stabiler Grundlage tatsächlich eine wirtschaftliche Aktivität verfolgen, bevor er Arbeitnehmer in einen anderen Mitgliedstaat entsenden kann.¹⁰

Die Entsenderichtlinie scheint sich auf das Kriterium des gewohnheitsmäßigen Ortes der Arbeitsausübung gemäß der Rom I Verordnung und dem Übereinkommen von Rom zu beziehen, wo in Artikel 2(1) dargelegt wird, dass ‚entsandter Arbeitnehmer‘ einen Arbeitnehmer definiert, der während eines begrenzten Zeitraums seine Arbeitsleistung im Hoheitsgebiet eines anderen Mitgliedstaates erbringt als demjenigen, *in dessen Hoheitsgebiet er normalerweise arbeitet* (Hervorhebung durch AH/MH). In dem Absatz über die Verbindung zwischen der Entsenderichtlinie und dem Internationalen Privatrecht schließen wir jedoch darauf, dass eine grundlegende Spannung existiert zwischen dem individualisierten Ansatz des IPR und den allgemeineren, kollektiven Ansätzen des kollektiven Arbeitsrechts und den Praktiken der staatlichen Durchsetzung. Um diese Systeme so weit wie möglich in Übereinstimmung zu bringen, sollten die Kriterien, die zur Überwachung der Einhaltung von Artikel 2(1) der Entsenderichtlinie angewandt werden, weitestgehend (auch) Erwägungen des Internationalen Privatrechts berücksichtigen. Was die Anwendbarkeit des speziellen Regelwerks der Entsenderichtlinie anbetrifft, sollten die Mitgliedstaaten und die EU sicherstellen, dass während des Zeitraums der Entsendung eine reale und maßgebliche Verbindung zwischen dem Entsendestaat und dem Arbeitsverhältnis der entsandten Arbeitnehmer besteht. Diese Anforderung, die auf der Definition des ‚entsandten Arbeitnehmers‘ gemäß Artikel 2(1) Entsenderichtlinie sowie auf Erwägungen des internationalen Privatrechts basiert, muss getrennt behandelt werden von der Anforderung aus dem Vertrag, dass der Arbeitgeber seine Niederlassung wirklich in einem EU-Mitgliedstaat haben muss, um von der Dienstleistungsfreiheit zu profitieren, und von der Anforderung aus Artikel 1(3), dass während der Dauer der Entsendung ein Arbeitsverhältnis zwischen dem Unternehmen,

⁹ Die genaue Interaktion zwischen den Vorschriften des Binnenmarktes und der Auswahl der rechtlichen Vorschriften der Rom I Verordnung ist derzeit nicht klar. Jedoch wurde klar festgelegt, dass das Ursprungslandprinzip, wie es in der Dienstleistungsrichtlinie festgelegt ist, nicht entscheidend ist für das auf die Arbeitsverträge von entsandten Arbeitnehmern anwendbare Recht. Siehe Richtlinie 2006/123/EG des Europäischen Parlaments und des Rats vom 12. Dezember 2006 über Dienstleistungen im Binnenmarkt OJ L 376, 27.12.2006, S. 36-68 14, Präambel Paragraphen 82, 86-87.

¹⁰ Man sollte die Frage, ob der Arbeitgeber ein Dienstleister im Sinne der AEUV ist, von der Frage unterscheiden, welches Recht auf den Arbeitsvertrag des Arbeitnehmers, der den Dienst leistet, Anwendung findet. Nicht alle Arbeitnehmer von grenzüberschreitenden Dienstleistern sind entsandte Arbeitnehmer: Manche werden möglicherweise am Ort der Verrichtung der Arbeit angeheuert oder arbeiten dort auf längerfristiger Basis. Die aktuelle Rechtsprechung im Vicoplus e.a-Fall (C-307/09-309/09) unterstützt die Unterscheidung zwischen dem Status des Arbeitgebers als Dienstleister und dem Status des Arbeitnehmers.

das die Entsendung vornimmt, und dem Arbeitnehmer bestehen muss. Die Tatsache, dass der Arbeitnehmer die Kosten der Entsendung trägt, könnte als Indikator gewertet werden für die Schaffung einer maßgeblichen Verbindung des Arbeitsverhältnisses mit dem Entsendestaat.

Die Spezifizierung der maßgeblichen Kriterien für die Entsendung wird am besten auf EU-Ebene erreicht (s. Empfehlung 1, Kapitel 5).¹¹ Auf nationaler Ebene sollten einige Mitgliedstaaten dem Schutz der aus ihrem Hoheitsgebiet entsandten Arbeitnehmer (mehr) Aufmerksamkeit schenken. Es könnte notwendig sein festzulegen, ob Arbeitnehmer, die von einem bestimmten Mitgliedstaat entsandt wurden, tatsächlich noch unter dem Schutz von dessen Arbeitsrecht stehen, um Lücken im Rechtsschutz der entsandten Arbeitnehmer zu vermeiden¹² (Empfehlung 2 in Kapitel 5).

Die Entsenderichtlinie und nationale Systeme des Arbeitsrechts

In verschiedenen Ländern wurde von Schwierigkeiten bei den Versuchen berichtet, die Entsenderichtlinie und das Fallrecht des Binnenmarktes mit ihrem System für die Festlegung von Arbeitsnormen zu vereinbaren. Der „Erga Omnes“-Ansatz sowie die in Artikel 3(8) festgelegten Bedingungen haben nicht nur in Schweden und Dänemark mit der dortigen Tradition der unabhängigen Festlegung von Standards (oft auf Unternehmensebene) zu Schwierigkeiten geführt, sondern auch in Deutschland und Italien und sogar in Großbritannien (in Industriezweigen wie der Baubranche, wo es immer noch relativ starke Gewerkschaften gibt). Darüber hinaus könnte die Auswirkung des Bestehens der Entsenderichtlinie auf die Auslegung der Vertragsbestimmung bezüglich des freien Dienstleistungsverkehrs (wie dokumentiert durch die Fälle Rüffert und Laval) die Möglichkeit beeinflussen, Arbeitsnormen durch andere Mechanismen aufzustellen als denen, die unter der Entsenderichtlinie festgelegt sind, wie Sozialklauseln in Verträgen zur (privaten und/oder öffentlichen) Auftragsvergabe.

Verschiedene Mitgliedstaaten haben ihr System abgeändert, um der Entsenderichtlinie und dem Fallrecht des EuGH zu entsprechen. Allerdings haben momentan nicht alle Mitgliedstaaten von den Mitteln Gebrauch gemacht, die ihnen zur Verfügung gestellt wurden, um den Auswirkungen des ‚Laval Quartetts‘ entgegenzuwirken. Soweit es für sie geeignet ist, sollten sie folgende Maßnahmen ergreifen (Empfehlung 3)¹³: 1) Falls relevant, expliziten Bezug nehmen auf die autonomen Methoden als Instrument für das Setzen von Mindeststandards. 2) Die relevanten Tarifverträge und die relevanten Normen innerhalb dieser Tarifverträge bestimmen. 3) Die Transparenz von in den Tarifverträgen enthaltenen Arbeitsnormen und -standards sicherstellen. 4) Nichtdiskriminierung bei der Anwendung nicht legislativer Standards gewährleisten.

Auch wenn die Mitgliedstaaten alle diese Maßnahmen ergreifen, bleibt eventuell eine Reihe von kontroversen Punkten bestehen, die nur auf EU-Ebene gelöst werden kann. Für die meisten Punkte in Bezug auf Artikel 3(8) empfehlen wir keine Änderungen, da (1) Maßnahmen auf nationaler Ebene die meisten Probleme zu lösen scheinen, die von allen relevanten Interessenvertretern anerkannt werden, (2) Gast- und Entsendestaaten sowie Sozialpartner im Hinblick auf die verbleibenden Aspekte getrennt werden. Dennoch halten wir Maßnahmen auf EU-Ebene für notwendig im

¹¹ Absatz 5.2 S. 174.

¹² Für weitere Details siehe Kapitel 2.2 und Kapitel 5.2, S. 174.

¹³ Absatz 5.2, S. 178.

Hinblick auf den Schutz und die Ausübung des grundlegenden Rechts auf Arbeitskampfmaßnahmen (s. Empfehlung 4)¹⁴ sowie im Hinblick auf die Möglichkeit, Sozialklauseln in öffentlichen Auftragsvergaben einzuführen (s. Empfehlung 5, Kapitel 5).¹⁵ Die Notwendigkeit für EU-Maßnahmen in diesen Bereichen ergibt sich aus der erheblichen rechtlichen Unsicherheit in Bezug auf Einzelheiten, die fundamentale Rechte und/oder internationale Verpflichtungen umfassen sowie die möglichen horizontalen Auswirkungen des EuGH-Fallrechts. Darüber hinaus ist es unwahrscheinlich, dass die Unsicherheit im Bereich der Kollektivmaßnahmen in nächster Zukunft durch zusätzliches EuGH-Fallrecht geklärt wird.¹⁶

In Bezug auf Arbeitskampfmaßnahmen hat das Fallrecht des EuGH Unsicherheiten hinterlassen in Bezug auf die Rolle, die die Gewerkschaften bei der Verteidigung der Rechte von entsandten Arbeitnehmern spielen dürfen. Gemäß den Autoren dieser Studie lohnt es sich festzulegen, in welchem Umfang Artikel 3(7) eher als Artikel 3(8) auf eine Situation Anwendung finden könnte, in der die Gewerkschaften überwiegend entsandte Arbeitnehmer bei deren Verhandlungen mit deren Arbeitgeber hinsichtlich der Arbeitsbedingungen während der Entsendung unterstützen. Ähnlicherweise kann Artikel 5 der Entsenderichtlinie relevant sein, wenn Gewerkschaften kollektiven Druck ausüben, um die Durchsetzung von bereits geltenden Vorschriften zu gewährleisten. Wir empfehlen der EU die Übernahme einer neuen legislativen Initiative, um die Einführung, Anwendung und Durchsetzung der Richtlinie zu verbessern, um die Unterscheidung zwischen einer Arbeitskampfmaßnahme, die die Standards des Gastlandes im Sinne von Artikel 3(8) einführen soll, einerseits und einer Arbeitskampfmaßnahme durch entsandte Arbeitnehmer, um eine Vereinbarung bezüglich besserer Arbeitsbedingungen zu erreichen, wie durch Artikel 3(7) abgedeckt, oder um in Artikel 5 gewährte Rechte durchzusetzen, andererseits zu klären.¹⁷ Ein weiteres Problem, dem Aufmerksamkeit geschenkt werden sollte, ist die Auswirkung von Schadenshaftung der Arbeitnehmer und Gewerkschaften auf die effektive Ausübung des Streikrechts. Es könnte außerdem lohnend sein, den Vorschlag im ‚Monti-Bericht‘ zu überdenken, eine Bestimmung einzuführen, die sicherstellt, dass die Entsendung von Arbeitnehmern im Kontext der grenzüberschreitenden Erbringung von Dienstleistungen nicht das Recht auf die Ergreifung von Kollektivmaßnahmen beeinflusst¹⁸.

Angesichts der Möglichkeiten für Mitgliedstaaten, Sozialklauseln in öffentliche Vergabeverfahren zu integrieren, sollte klargestellt werden, in welchem Umfang die Befolgung der Konvention Nr. 94 durch die Mitgliedstaaten tatsächlich gegen EU-

¹⁴ Absatz 5.2 S. 179, siehe auch die Erörterung von strittigen Fällen unten.

¹⁵ Siehe Absatz 5.2 ‚Die Entsenderichtlinie und nationale Systeme des Arbeitsrechts – Probleme, verursacht durch Art. 3(8) Entsenderichtlinie und EuGH-Fallrecht‘ S. 175 ff. und Empfehlungen 3-5.

¹⁶ Absatz 5.2 S. 180.

¹⁷ Eine weitere Wiederinkraftsetzung der Freiheit der Gewerkschaften des Gastlandes, ein Festhalten an lokalen Tarifverträgen (als Instrument zum Setzen von allgemeinen Standards) zu veranlassen, scheint eine Umformulierung der Verpflichtungen aus Artikel 3(8) zu erfordern. Nach unserer Meinung könnte dies erfolgen, indem der aktuelle Fokus auf allgemeiner Anwendbarkeit/Anwendung durch klare Verpflichtungen in Bezug auf Nichtdiskriminierung und Transparenz ersetzt wird.

¹⁸ Nach dem Vorbild der Verordnung (EG) Nr. 2679/98 (der sog. Monti-Verordnung). Siehe: M. Monti, Eine neue Strategie für den Binnenmarkt, 9. Mai 2010; siehe auch die Fortsetzung in Vorschlag 29 und 30 der Kommunikation der Kommission, Auf dem Weg zu einer Binnenmarkttakte. Für eine in hohem Maße wettbewerbsfähige soziale Marktwirtschaft. 50 Vorschläge, um gemeinsam besser zu arbeiten, zu unternehmen und Handel zu treiben. Brüssel, 27.10.2010 KOM (2010) 608 endgültig.

Recht verstoßen kann, und insbesondere, ob die Behinderung, die Sozialklauseln im Hinblick auf den freien Dienstleistungsverkehr darstellen können, durch übergeordnete Gründe des Allgemeininteresses gerechtfertigt werden kann, dies unter Berücksichtigung der von Konvention Nr. 94 geförderten Werte.

3. Eingehende Analyse der Einführung und Anwendung der Entsenderichtlinie

Kapitel 3 behandelt die Probleme, die bei der Einführung und Anwendung der Richtlinie in der Praxis bestehen. Das Hauptaugenmerk in diesem Teil der Untersuchung liegt auf den Artikeln 1 und 2 der Entsenderichtlinie, die Bezug nehmen auf das Konzept des Entsendens und der entsandten Arbeitnehmer, sowie auf Artikel 3 der Entsenderichtlinie, der sich mit den Arbeits- und Beschäftigungsbedingungen der entsandten Arbeitnehmer beschäftigt. Da die Sozialpartner sowohl in die Einführung als auch die Anwendung dieser Artikel der Richtlinie involviert sein können, werden auch relevante Aspekte ihrer Einbindung untersucht. Um die Probleme zu illustrieren, die in der Praxis bezüglich des Konzepts der Entsendung und im Hinblick auf die rechtliche Position der entsandten Arbeitnehmer entstehen, wird außerdem die Übergangsregelung untersucht, die nach dem Beitritt der neuen Mitgliedstaaten in den Jahren 2004 und 2007 eingeführt wurde.

Persönlicher Geltungsbereich der Richtlinie

Allgemeine Anmerkungen

Die Richtlinie hat das Ziel, die Gesetze der Mitgliedstaaten zu koordinieren, indem sie klar festgelegte Vorschriften für einen Mindestschutz des Gaststaates aufstellt, die von Arbeitgebern befolgt werden müssen, die zeitweise Arbeitnehmer entsenden, um Dienstleistungen in ihrem Hoheitsbereich zu erbringen. Für diese Art der Dienstleistungen stellt die Entsenderichtlinie – wie gemäß dem EuGH-Fallrecht ausgelegt – rechtliche Rahmenbedingungen auf, nach denen der Arbeitsschutz des Gastlandes angewendet werden soll, allerdings nur in einem begrenzten Ausmaß. Demzufolge nimmt gemäß den Autoren dieser Studie die Gruppe der entsandten Arbeitnehmer eine mittlere Position ein zwischen mobilen Arbeitnehmern, die sich zeitweilig im Hoheitsgebiet eines anderen Mitgliedstaats befinden, aber nicht dessen Gesetzgebung unterliegen,¹⁹ und mobilen Arbeitnehmern, die inzwischen als Teil der Erwerbstätigen des Gastlandes gelten und daher dessen Gesetzen in Gänze unterliegen.

Die Richtlinie enthält Kriterien für die Unterscheidung von Entsendungen durch andere Arten von Arbeitskräftemobilität. Diese Kriterien verursachen Probleme in Bezug auf Interpretation und Abgrenzung, die im Folgenden erörtert werden. Um solche Probleme zu vermeiden, haben verschiedene Mitgliedstaaten entschieden, die in der Entsenderichtlinie angewandten Kriterien des persönlichen Geltungsbereichs nicht in ihre Einführungsstatuten aufzunehmen, sondern statt dessen die relevanten²⁰

¹⁹ Z. B. ein Arbeitnehmer, der ein Seminar oder Schulungsprogramm in einem anderen Mitgliedstaat besucht.

²⁰ Die Entsenderichtlinie beinhaltet eine Liste von Standards, die in dieser Hinsicht relevant sind, doch manche Mitgliedstaaten erweitern den Schutz jenseits der in der Richtlinie aufgezählten Schutzbereiche. Beispielsweise verfügt Großbritannien über kein Umsetzungsstatut, sondern wendet seinen gesamten staatlichen Schutz auf entsandte Arbeitnehmer an, basierend auf den individuellen Anwendungsbereichen der Statuten selbst.

Standards von Arbeitsgesetzen und -schutz auf jeden anzuwenden, der innerhalb des Hoheitsgebiets arbeitet (oder vergleichbare Kriterien). Ein deutlicher Nachteil dieser letztgenannten Methode der Einführung ist, dass sie zu einer übermäßigen Anwendung der Einführungsmaßnahme führen könnte. Dies könnte zu übermäßigen Belastungen des freien Dienstleistungsverkehrs führen, da die nationalen Schutzgesetze auch in Situationen greifen, wo eine solche Anwendung ineffektiv und/oder unverhältnismäßig ist. Daher wird Mitgliedstaaten geraten, das Konzept der Entsendung in ihre Gesetzgebung aufzunehmen (Empfehlung 6).²¹

Die Untersuchung von Fällen²², die das Interesse der Medien auf sich gezogen haben, gibt einen klaren Hinweis darauf, dass sich die kontroversesten Fälle oftmals auf Situationen von ‚kreativer Verwendung‘ der Freizügigkeiten beziehen, wobei die Erbringung von Dienstleistungen dazu eingesetzt wird, die (volle) Anwendung der Gesetzgebung des Gastlandes zu umgehen. Die Beispiele schließen die Einrichtung von Briefkastenfirmen ein, die dann Arbeitnehmer speziell dazu einstellen, um sie in andere Mitgliedstaaten zu entsenden und Vorfälle von aufeinander folgenden Entsendungen eines einzelnen Arbeitnehmers in einen einzelnen Mitgliedstaat durch verschiedene ‚Arbeitgeber‘ in verschiedenen Mitgliedstaaten.²³ Während man in manchen Fällen daran zweifeln kann, ob der Arbeitgeber tatsächlich im Entsendestaat niedergelassen ist, fehlt in anderen Fällen eine Verbindung zwischen dem Arbeitsvertrag und dem Land der Niederlassung des Arbeitgebers. Eine klare und durchsetzbare Definition sowohl des Konzepts der Entsendung als auch des Konzepts des entsandten Arbeitnehmers auf der Basis des Zwecks der Richtlinie könnte helfen, dem entgegenzuwirken. Um zu verhindern, dass Arbeitgeber die Vorschriften umgehen und missbrauchen, bedarf es darüber hinaus einer klaren Definition von „Unternehmen, die in einem Mitgliedstaat niedergelassen sind“ (siehe z.B. Art 4(5) der Dienstleistungsrichtlinie 2006/123/EG). Nur tatsächlich „niedergelassene“ Unternehmen können von der Dienstleistungsfreiheit und somit von der Entsenderichtlinie profitieren.

Probleme in Bezug auf bestimmte, in der Entsenderichtlinie angewandte Kriterien

Gemäß Artikel 2 der Entsenderichtlinie soll der Arbeitnehmer ‚für einen begrenzten Zeitraum‘ an einen anderen Mitgliedstaat als denjenigen entsandt werden, in dem er ‚normalerweise arbeitet‘. Allerdings enthält die Richtlinie weder einen Hinweis auf die zeitliche Begrenzung der Entsendung noch auf die Art und Weise wie zu prüfen ist, ob es tatsächlich ein Land gibt, in dem der Arbeitnehmer normalerweise beschäftigt ist. Die nationalen Einführungsmaßnahmen enthalten normalerweise auch keine spezifischen Kriterien. Manche Mitgliedstaaten haben Vorsichtsmaßnahmen getroffen, um den Missbrauch zu begrenzen (z. B. LUX, FR), die sich auf die Erzeugung einer echten Verbindung zwischen dem Arbeitgeber und seinem Herkunftsland konzentrieren. Es ist jedoch selten der Fall, spezielle Vorschriften zu finden, die sich auf die Erzeugung einer echten Verbindung zwischen dem

²¹ Abschnitt 5.3, Unterscheidung der Entsendung von anderen Arten der Mobilität – durch die (das Nichtvorhandensein der) Einführung und Anwendung auf nationaler Ebene verursachte Probleme‘ S. 182 – 183.

²² S. Abschnitt 3.5, S. 54, und Anhang I.

²³ Für weitere Beispiele s. Abschnitt 3.5., S. 54.

Arbeitnehmer und seinem gewohnheitsmäßigen Arbeitsort innerhalb des genannten Landes konzentrieren.²⁴

Bezüglich der Definition des ‚begrenzten Zeitraums‘ wird dringend empfohlen, die Definition der zeitlich begrenzten Entsendung in Art. 2 Entsenderichtlinie zu klären, entweder durch die Einbeziehung einer widerlegbaren Vermutung der permanenten Mobilität in dem Fall, dass die Dauer der Entsendung einen bestimmten Zeitraum überschreitet, und/oder durch Angabe, welche Mindestverbindungen zu dem Land, in dem der entsandte Arbeitnehmer normalerweise arbeitet, bestehen sollten, damit die Mobilität als Entsendung gemäß der Entsenderichtlinie zu bezeichnen ist (Empfehlung 11, Kapitel 5). In beiden Fällen sollte darauf Acht gegeben werden, die Anforderungen aus dem Vertrag im Hinblick auf die Dienstleistungsfreiheit einzuhalten. Um deutlicher zu unterscheiden zwischen ‚passiver Mobilität‘ eines Arbeitnehmers, der im Rahmen einer Dienstleistungserbringung von seinem Arbeitgeber entsandt wurde, und ‚aktiver Mobilität‘ eines Arbeitnehmers, der in den Arbeitsmarkt eines anderen Mitgliedstaats eintritt, um von Arbeitsmöglichkeiten zu profitieren, könnte es empfehlenswert sein, den Text von Artikel 3(7) zweiter Satz der Entsenderichtlinie dahingehend zu ändern, dass die Rückvergütung von Reisekosten, Kost und Logis/Unterkunft für den Dienstleister verbindlich wird (Empfehlung 12, Kapitel 5). In jedem Fall, aber vor allem, wenn auf EU-Ebene keine Einigung bezüglich dieser Punkte erzielt werden kann, sollten die Mitgliedstaaten selbst sicherstellen, dass die Richtigkeit der zeitweiligen Entsendung durch die Überwachungs- und Aufsichtsbehörden auf transparente und effektive Weise aufrechterhalten wird (Empfehlung 13, Kapitel 5).²⁵

Die Entsenderichtlinie muss im Kontext der freien Erbringung von Dienstleistungen angesiedelt werden, die durch Artikel 56 AEUV geschützt ist. Allerdings beschränken nicht alle nationalen Einführungsmaßnahmen ihre Anwendung auf Fälle, in denen durch einen Arbeitgeber grenzüberschreitende Dienste für einen Dienstleistungsempfänger in einem anderen Mitgliedstaat geleistet werden. Ein Fall aus der Praxis, der in verschiedenen Mitgliedstaaten zu Diskussionen führt, ist der Trainee, der als Teil seines Schulungsprogramms ins Ausland geschickt wird.²⁶ Ein Trainee hält sich im Hoheitsgebiet des Gastlandes aus beruflichen Gründen auf und profitiert möglicherweise eher von der Freiheit, Dienstleistungen zu *empfangen*, als von der Freiheit, solche zu *erbringen*. In Bezug auf zwei Arten der Entsendung scheint die Entsenderichtlinie das Vorhandensein eines Dienstleistungsvertrags zwischen dem Arbeitgeber und dem Dienstleistungsempfänger im Gastland zu erfordern.²⁷ Eine strenge Auslegung dieser Anforderung würde die Anwendung der Entsenderichtlinie für Entsendungen blockieren, bei denen der Arbeitsvertrag durch eine eigenständige Rechtsperson, die sich vom Dienstleister unterscheidet,

²⁴ Frankreich hat eine Vorschrift, die in Frankreich angeheuerte Arbeitnehmer vom Anwendungsbereich seiner Einführungsbestimmungen ausschließt. L 1262/3, siehe Kapitel 3.2, S. 32, 46.

²⁵ Abschnitt 5.3, S. 185-186.

²⁶ Der Punkt wurde insbesondere in den Berichten der Experten Belgiens und Luxemburgs aufgeworfen. In diesen Ländern sind Kriterien entwickelt worden, um die Anwendung der Entsenderichtlinie auf Trainees festzulegen. Die Anwendung der Einführungsmaßnahme auf Trainees ist jedoch in Großbritannien und den Niederlanden unklar. Siehe auch Kapitel 3.2, S. 40-41.

²⁷ Explizit gefordert in Art. 1(3) a und implizit bez. Art. 1(3) c Entsendungen.

geschlossen wird.²⁸ Unserer Ansicht nach sollte die Existenz eines Vermittlers zwischen dem Arbeitgeber und dem Dienstleistungsempfänger die Anwendung der Richtlinie in den Fällen nicht verhindern, die ansonsten die Ziele der Richtlinie erfüllen. Es ist empfehlenswert, beide Anforderungen zu klären und, wenn notwendig, abzuändern, damit sie dem Zweck der Richtlinie entsprechen (Empfehlung 7, Kapitel 5).²⁹ Besteht keine Lösung auf EU-Ebene, wäre eine weitere Klärung durch die Mitgliedstaaten begrüßenswert.

Probleme in Bezug auf bestimmte Branchen

Der Begriff der Entsendung von Arbeitnehmern im Rahmen der länderübergreifenden Erbringung von Dienstleistungen in der Entsenderichtlinie schließt Leiharbeiter mit ein. Allerdings ist der Status dieser Arbeitnehmer im Kontext des Binnenmarktes ein umstrittenes Thema. In seinem Gutachten zum Vicoplus-Fall merkte Generalanwalt Y. Bot an, dass, obwohl der Arbeitgeber den freien Dienstleistungsverkehr nutzt, der Leiharbeiter (auch) unter die Übergangsregelung fallen könnte, die es den Mitgliedstaaten gestattet, die Freizügigkeit von Arbeitnehmern einzuschränken.³⁰ In seinem Urteil vom 10. Februar 2011 ist der EuGH dem Standpunkt des Generalanwaltes in dieser Hinsicht gefolgt. Gemäß Artikel 3(9) der Entsenderichtlinie können Gastländer bestimmen, dass entsandten Leiharbeitern der gleiche Schutz garantiert werden sollte, den nationale Leiharbeiter genießen. Es ist gegenwärtig unklar, wie diese spezielle Bestimmung mit der Leiharbeiter-Richtlinie und den Vertragsbestimmungen interagiert. Eine Klärung der Interaktion zwischen der Leiharbeiter-Richtlinie und der Entsenderichtlinie wäre begrüßenswert (Empfehlung 8, Kapitel 5).³¹

Obwohl sich die Richtlinie mit auf Transportarbeiter bezieht (mit Ausnahme von Schiffsbesatzungen der Handelsmarine), ist das System der Richtlinie schlecht geeignet für die Behandlung von Arbeitnehmern, die nicht *in* einem bestimmten Land arbeiten, sondern eher *von* einem bestimmten Land aus. Größtenteils wird davon ausgegangen, dass sich die Entsenderichtlinie auf die Kabotage bezieht, aber die Ausführung der Überwachung des Schutzes ist höchst problematisch. Darüber hinaus können bestimmte Anforderungen in der Entsenderichtlinie (vor allem die Existenz eines Dienstleistungsvertrags zwischen dem Arbeitgeber und dem Empfänger im Gastland) die Anwendung des Schutzes auf Transportarbeiter blockieren, auch im Fall der Kabotage. Es erscheint ratsam, eine Untervorschrift für die Anwendung der Entsenderichtlinie auf Transportarbeiter zu formulieren. Da es diese nicht gibt, und in Erwartung einer europäischen Lösung, können die Mitgliedstaaten die nationalen Sozialpartner in der Branche mit einbeziehen, um die richtige Anwendung und

²⁸ Der schwedische Experte erörtert die Position eines Fahrers internationaler Transporte, der eine Kabotage durchführt im Rahmen einer Anstellung, in der ein Spediteur den Kabotagevertrag abgeschlossen hat. Der deutsche Experte berichtet von der Situation der Doppelentsendung, wo ein Arbeitnehmer im Inland an ein entleihendes Unternehmen entsandt wird, das den Arbeitnehmer dann an einen anderen Mitgliedstaat entsendet.

²⁹ Abschnitt 5.3 ‚Entsendung im Rahmen der Erbringung von Dienstleistungen – durch die Richtlinie verursachte Probleme‘ S. 183-184. Für weitere Veranschaulichung des Problems s. Abschnitt 3.2 ‚Erbringung einer Dienstleistung‘ S. 40-43.

³⁰ Folgerung vom 9. September 2010, verbundene Rechtssachen C-307/09 bis C-309/09. S. auch C-113/89 (Rush Portuguesa).

³¹ Abschnitt 5.3 ‚Leiharbeitsunternehmen‘ S. 185-186.

Durchsetzung der Entsenderichtlinie auf diesen Sektor festzulegen (Empfehlungen 9 und 10, Kapitel 5).³²

Die Übergangsregelung

Mehrere ‚alte‘ Mitgliedstaaten (EU15) wandten oder wenden in Bezug auf die Freizügigkeit von Arbeitnehmern noch eine Übergangsregelung von acht der zehn neuen Mitgliedstaaten an, die 2004 beigetreten sind (EU8), und von den beiden 2007 beigetretenen Mitgliedstaaten (Rumänien und Bulgarien, EU2). Nur Deutschland und Österreich erörtern auch die Möglichkeit, dem freien Dienstleistungsverkehr Beschränkungen aufzuerlegen, wenn dieser die grenzüberschreitende Entsendung von Arbeitnehmern betrifft. Eine Untersuchung der Übergangsregelung ist im gegenwärtigen Kontext aus verschiedenen Gründen von Interesse.³³

- Die von den Mitgliedstaaten während dieses Zeitraums ergriffenen Maßnahmen können Informationen liefern über die Bereiche, die problematisch erscheinen in Bezug auf die Arbeitskräftemobilität innerhalb Europas.
- In Ländern, die die freie Erbringung von Dienstleistungen erlauben, nicht jedoch die Freizügigkeit der Arbeitnehmer, gibt die Übergangsregelung Aufschluss darüber, wo die Mitgliedstaaten die Grenze zwischen den beiden Freizügigkeiten ziehen.

In Bezug auf den ersten Aspekt ist es interessant festzustellen, dass sowohl in Belgien als auch in den Niederlanden die Aufhebung der Übergangsregelung abhängig gemacht wurde von Maßnahmen, die Verbesserungen bei der Durchsetzung der Überwachung der Arbeitsgesetze und der Mobilität sicherstellen. Das unterstreicht die Bedeutung effektiver Maßnahmen für die Durchsetzung des nationalen Arbeitsschutzes für die Regelung der Migration im Allgemeinen und die Entsendung im Besonderen. In dieser Hinsicht kann eine Studie zu den Maßnahmen, die während der Übergangsphase ergriffen wurden, auch Informationen zu den Best Practices in Bezug auf die Bekämpfung des Missbrauchs liefern.

Eine Reihe von Ländern hat Maßnahmen ergriffen, um zu gewährleisten, dass der Arbeitnehmer sich in einer ‚echten‘ Entsendesituation befindet. Die Niederlande überprüfen beispielsweise, ob das entsendende Unternehmen tatsächlich seinen Sitz im Heimatland hat und dort regelmäßig Geschäfte tätigt oder ob es sich eher um eine Briefkastenfirma handelt. In Dänemark wird die erforderliche Aufenthaltserlaubnis nur gewährt, wenn bestimmte Anforderungen erfüllt sind. Diese schlossen Anforderungen mit ein bezüglich des dauerhaften Charakters der Beschäftigung im entsendenden Unternehmen sowie die Anforderung, dass der entsandte Arbeitnehmer die Absicht haben und in der Lage sein muss, in sein Heimatland bzw. das Land des Firmensitzes zurückzukehren, wenn die Arbeit abgeschlossen ist. Auch Luxemburg und Frankreich haben Beschränkungen auferlegt, z. B. indem sie fordern, dass der Entsendung ein Zeitraum der Beschäftigung im Heimatland vorausgeht. Verschiedene Urteile des EuGH haben gezeigt, dass solche Anforderungen oder Praktiken Kompatibilitätsprobleme mit dem EU-Recht verursachen (unverhältnismäßig sein)

³² Abschnitt 5.3 ‚Transportarbeiter‘ S. 187.

³³ Für eine detailliertere Beschreibung der Übergangsmaßnahmen, s. Abschnitt 3.4, S. 51 – 53.

können. Allerdings lenken sowohl die Maßnahmen als auch die Bewertung einer Reihe dieser Maßnahmen durch den EuGH die Aufmerksamkeit auf die Notwendigkeit und die Schwierigkeit, klare Kriterien dafür zu finden, die Entsendung von anderen Arten der Arbeitnehmermobilität zu unterscheiden.

In Bezug auf die Unterscheidung zwischen Freizügigkeit der Arbeitnehmer und der freien Erbringung von Dienstleistungen ist ein erheblicher Konflikt entstanden um die Position der Leiharbeiter (s. oben, Fußnote 30). Ihr Status war kürzlich Gegenstand eines vorläufigen Verfahrens, das von Dienstleistungserbringern in den Niederlanden initiiert wurde, wo seit dem 1. Dezember 2005 nur die Entsendung Typ 1 (gemäß Artikel 1(3)(a)) als von der Übergangsregelung ausgenommen betrachtet wird.³⁴ Der EuGH hat entschieden, dass die Anwendung von Übergangsmaßnahmen auf Arbeitnehmer, die von Leiharbeitsunternehmen mit Niederlassung in den neuen Mitgliedstaaten in die Niederlande entsandt werden, mit EU-Recht vereinbar ist. Hinsichtlich dieser Arbeitnehmer wurde unterstellt, dass sie den niederländischen Arbeitsmarkt betreten.

Überblick über strittige Fälle

In unserem Fragebogen baten wir die nationalen Experten, eine Übersicht über die strittigen Fälle – sowohl vor Gericht als auch in den Medien – zu geben. Diese Aufgabe hatte drei Ziele:

- Trends in den Ländern und Branchen zu identifizieren, in denen von Problemen berichtet wurde.
- Die strittigen Aspekte der Entsendung zu bestimmen. Wir sind im Besonderen an solchen Faktenmustern interessiert, die in der Untersuchung wiederholt auftreten.
- Allgemeine Trends in der Durchsetzung der Entsenderichtlinie zu erkennen.

In Bezug auf den ersten Punkt gab und gibt es eine hitzige Debatte – die zu zahlreichen Fällen führte (speziell in der öffentlichen Diskussion) – in den ‘alten’ Mitgliedstaaten Deutschland, Belgien, Luxemburg, Frankreich und den Niederlanden. Deutlich weniger Interesse besteht auf Seiten der Entsendestaaten wie Estland, Polen und Rumänien. Die Diskussion in Schweden, Dänemark und England hat erst vor Kurzem eingesetzt und konzentriert sich deutlich auf die Position der Sozialpartner.

Werden die berichteten Fälle nach Branchen sortiert, stechen drei Branchen hervor: Leiharbeiter, Bausektor und Straßengüterverkehr. Die Landwirtschaft hat ebenfalls eine kleine Anzahl an Fällen geliefert, diese sind aber oftmals nicht eng mit der Entsendung verbunden. Andere Branchen, die eher nebenbei erwähnt werden, sind das Gesundheitswesen, Garnelenschälbetriebe, Einzelhandel, Reinigungsunternehmen und Fleischverarbeitung.³⁵

Sowohl in den Medien als auch in den wenigen Rechtsfällen, denen nachgegangen wurde, werden entsandte Arbeitnehmer selten als eine spezifische Kategorie von

³⁴ Für (den Bezug auf) weitere Details zu der Entwicklung der niederländischen Übergangsregelung im Hinblick auf den Sachverhalt der Entsendung, siehe Kapitel 3.4, Fußnote 74, S. 52.

³⁵ S. Anhang I der vergleichenden Studie und Kapitel 3.5, S. 54 - 60 für eine ausführliche Analyse.

Arbeitnehmern bezeichnet. Anscheinend können andere Arten der Mobilität vergleichbare Faktenmuster liefern, auch wenn die rechtliche Position der Arbeitnehmer abweichen kann. Dies kann durch die Tatsache erklärt werden, dass in der täglichen Praxis Arbeitgeber und Arbeitnehmer gleichermaßen mehr an der Möglichkeit interessiert sind, im Ausland zu arbeiten als an dem präzisen rechtlichen Status ihrer Aktivitäten. Der Überblick über die Fälle, die öffentliches Interesse erregt haben, zeigt deutlich, dass strittige Fälle sich oft auf Situationen beziehen, die nicht als ‚echte‘ Entsendung klassifiziert werden sollten, zum Beispiel deshalb, weil der Arbeitnehmer nicht normalerweise in einem anderen als im Gastland arbeitet oder weil das Unternehmen, das den Arbeitnehmer entsendet, nicht in dem Land ‚niedergelassen‘ ist, aus dem die Entsendung erfolgt. Schließlich könnte ein Arbeitsverhältnis zwischen dem Arbeitgeber und dem entsandten Arbeitnehmer fehlen. Dies verdeutlicht erneut die Notwendigkeit einer präziseren und durchsetzbaren Definition der Konzepte der ‚Entsendung‘ und des ‚entsandten Arbeitnehmers‘.

Schließlich sollte festgehalten werden, dass Gewerkschaften eine wichtige Rolle in der Durchsetzung der Entsenderichtlinie in der Praxis spielen. Wenn im Zusammenhang mit der Entsendung auf das Mittel des Streiks zurückgegriffen wird, lenkt das unweigerlich die Aufmerksamkeit der Medien auf sich. Allerdings gibt es Berichte – vor allem aus Großbritannien –, dass die Gewerkschaften als Folge des Laval-Urteils vorsichtig geworden sind, die Unterstützung solcher Aktionen anzubieten. Dies erhöht das Risiko für wilde Streiks und scheint der problemlösenden Qualität solcher Aktionen abträglich zu sein.

Materieller Anwendungsbereich der Richtlinie

Die Richtlinie enthält eine Liste von Schutzbereichen, die den absoluten Kernbereich des Schutzes festlegen, für den die Mitgliedstaaten zu gewährleisten haben, dass ungeachtet des auf das Arbeitsverhältnis anwendbaren Rechts die Artikel 1(1) genannten Unternehmen Arbeitnehmern, die in ihr Hoheitsgebiet entsandt werden, die in ihren Gesetzen und in allgemeinverbindlichen Tarifverträgen festgelegten Arbeitsbedingungen garantieren. Gemäß der aktuellen Auslegung der Richtlinie durch den EuGH darf das Gastland Schutzmaßnahmen nur dann in anderen Bereichen auferlegen, wenn das Land diese aus Gründen der öffentlichen Ordnung rechtfertigen kann. Der abschließende Charakter, der damit der Richtlinie zukommt, fokussiert die Aufmerksamkeit auf die Grenzen der in der Richtlinie verwendeten Konzepte. In diesem Teil der Studie konzentrieren wir uns auf die Auslegung dieser Konzepte sowie auf die Benennung der Probleme, die bei der Anwendung der spezifischen Schutzarten auftreten.

Löhne und Arbeitszeit

Die Vorschriften zu Löhnen werden von den meisten Experten neben den Sicherheits- und Gesundheitsvorschriften sowie in geringerem Maße auch den Arbeitszeit- und Urlaubsvorschriften als überaus wichtig bezeichnet. Sie können als „absoluter Kernbereich des harten Kerns“ der Schutzmaßnahmen bezeichnet werden. Mit anderen Worten, sie stellen den härtesten Kern innerhalb des harten Kerns der Rechte

dar. Jedoch ist die Auslegung des Konzeptes selbst ungewiss, zudem ist seine Anwendung in der Praxis problematisch.

Die Richtlinie delegiert die Auslegung des Konzeptes von ‚Mindestlohnsätzen‘ an die Mitgliedstaaten. Darüber hinaus gestattet die Richtlinie den Mitgliedstaaten insbesondere, sich allgemein verbindlicher Tarifverträge als Mittel zur Etablierung eines Mindestmaßes an Schutz in den von der Entsenderichtlinie umfassten Bereichen zu bedienen. Jedoch bietet die Entsenderichtlinie keine klare Antwort auf die Frage, ob das Gastland nur einen einzigen Mindestlohn (Pauschalbetrag) oder aber eine Reihe von Vorschriften, die je nach Einzelfall einen gesonderten Mindestlohnsatz festlegen (Lohnstruktur/Karriereleiter), vorschreiben darf. Diese beiden Ebenen können erheblich voneinander abweichen. Demzufolge gilt: Wenn die Entsenderichtlinie gleiche Wettbewerbsbedingungen schaffen soll, ist die Anwendung der gesamten Lohnstruktur überaus wichtig.

Abgesehen von dieser Diskussion des Konzepts der Mindeststandards sollte erwähnt werden, dass das Konzept der „Mindestlohnsätze“ ebenfalls alles andere als deutlich ist. Welche Arbeitsbedingungen sollte bei der Festlegung der Mindestlohnsätze berücksichtigt werden, welches dagegen nicht? Darüber hinaus gibt es große Verwirrung bezüglich der Standards, die zum Zwecke des Vergleichs zwischen den tatsächlich gezahlten Löhnen und dem von dem Gastland vorgeschriebenen Mindestlohn heranzuziehen sind. Ein ähnliches (aber nicht identisches) Problem beim Ziehen von Vergleichen liegt in der Möglichkeit, dass der Arbeitnehmer eventuell auf einen besseren, von dem Entsendestaat gebotenen Schutz gemäß Artikel 3(7) vertrauen kann.

Die in den Berichten benannten Probleme betreffen unter anderem:

- Leistung von Beiträgen zu Kassen;
- die Möglichkeit, Schutzebenen zu kombinieren, insbesondere in Bezug auf Überstundensätze³⁶;
- Vergleichbarkeit und Austauschbarkeit von speziellen Leistungen³⁷;
- spezielle Zahlungen in Bezug auf die Entsendung und die Unterscheidung zwischen Lohn und Erstattung von Kosten;
- Komplikationen aufgrund von Steuern und Beiträgen (das Brutto-Netto-Problem);
- der Umstand, dass Kosten von den dem Arbeitnehmer geschuldeten Löhnen einbehalten werden.

Mitgliedstaaten und Sozialpartner haben Initiativen ergriffen, um den Problemen, die aus dieser Ungewissheit resultieren, entgegenzuwirken. Nicht nur haben einige von ihnen Anstrengungen unternommen, um die geltenden Vorschriften detaillierter zu bestimmen, sie haben darüber hinaus gelegentlich Mittel bereitgestellt, um die darin enthaltenen Rechte dergestalt umzuwandeln, dass diese besser auf die Situation des

³⁶ Der polnische Bericht erwähnt besonders das Problem des Kombinierens des (höheren) Überstundentarifs des Entsendestaates mit dem (höheren) Grundgehaltslevel des Gastlandes. Für weitere Beispiele siehe Kapitel 3.6, S. 75.

³⁷ Im niederländischen / deutschen Kontext wurde die Frage der Austauschbarkeit eines Zeitanparkontos gegen ein Urlaubskonto aufgeworfen. Der italienische Bericht erwähnt Probleme in Bezug auf die gegenseitige Anerkennung des Festhaltens an Konten im Bausektor. Siehe Kapitel 3.6, S. 76 für weitere Details.

entsandten Arbeitnehmers zugeschnitten sind. Die im vollständigen Bericht enthaltenen Beispiele könnten als Best Practices dienen³⁸. Jedoch gibt es sowohl in Bezug auf die Grenzen des Konzepts der „Lohnsätze“ als auch in Bezug auf den (die) Standard(s) für das Ziehen von Vergleichen eindeutig einen Bedarf an Europäischen Leitlinien (siehe Empfehlung 15, Kapitel 5).³⁹

Ein gesondertes Problem betrifft das Verhältnis zwischen den gezahlten Löhnen und der Anzahl der geleisteten Arbeitsstunden. Dieses Problem wird teilweise durch die Vorschriften zu Mindestlöhnen in den Mitgliedstaaten selbst verursacht. Wenn Mindestsätze pro Stunde festgelegt werden, beeinflusst die Anzahl der geleisteten Arbeitsstunden unmittelbar die am Ende des Tages, der Woche oder des Monats gezahlten Löhne. Auf der anderen Seite können monatliche Lohnsätze zu sehr unterschiedlichen effektiven Stundenlohnkosten je nach Anzahl der geleisteten Arbeitsstunden führen. Die Mitgliedstaaten werden also ermutigt, einen Mindeststundenlohn einzuführen, soweit sie dies nicht bereits getan haben (Empfehlung 16, Kapitel 5)⁴⁰.

In Bezug auf die effektiven Stundenlohnkosten jedoch scheint das größere Problem die (nationale) Überwachung und Durchsetzung von Arbeitszeitvorschriften zu sein. Dies gilt ebenfalls für den Anspruch auf bezahlten Urlaub. Obwohl dieser offiziell Teil des harten Kerns ist, scheint dieser Anspruch in der Praxis kaum eine Rolle zu spielen. Nur dann, wenn der Anspruch auf bezahlten Urlaub über eine spezielle Urlaubskasse realisiert wird, sind der Anspruch selbst und seine Durchsetzung in der Praxis von Bedeutung.

Andere Schutzbereiche in Artikel 3(1)

Die Anwendung von lokalen Sicherheits- und Verhaltensvorschriften wird nicht bestritten und führt nicht zu besonderen Schwierigkeiten. Die Hauptschwierigkeiten, die in diesem Bereich in der Praxis auftreten, betreffen die praktische Durchsetzung von Sicherheitsbestimmungen sowie effektive Kommunikation in einer multilingualen Belegschaft⁴¹. Jedoch beinhalten Regelwerke zu Gesundheitsschutz und Sicherheit eine große Vielfalt an Vorschriften und Regulierung – von Sicherheitsbestimmungen in Bezug auf den Arbeitsplatz über die Verpflichtung zur regelmäßigen Durchführung von Risikoanalysen bis hin zu Haftungsmaßnahmen bei Arbeitsunfällen⁴². Die Mitgliedstaaten unterscheiden sich in ihrer Auslegung des Anwendungsbereichs der Sicherheits- und Gesundheitsvorschrift gemäß Artikel 3(1). Eine Klärung dieser Angelegenheit wäre begrüßenswert (Empfehlung 17).⁴³

Zudem beinhalten die sicherheits- und gesundheitsbezogenen Regelwerke einiger Mitgliedstaaten Pflichten, so etwa Schulungsanforderungen für Arbeitnehmer mit gefährlichen Arbeitsplätzen und obligatorische Gesundheitschecks vor Arbeitsbeginn⁴⁴, die Probleme in Form der gegenseitigen Anerkennung und

³⁸ Kapitel 3.6 „Best Practices bei der Anwendung der Vorschriften zu Löhnen und Arbeitszeit“, S. 75-77.

³⁹ Kapitel 5.4 „Lohnsätze – konstituierende Elemente und Vergleich“, S. 191-192.

⁴⁰ Kapitel 5.4 „Effektive Stundensätze“, S. 192-193.

⁴¹ Probleme bei der Durchsetzung werden in DK, IT, Lux, S berichtet. Sprachliche Probleme werden in Lux und B berichtet. PL berichtet keine Probleme in dieser Hinsicht! Siehe K.3.7, S. 78-82.

⁴² Siehe Kapitel 3.7 „Struktur der Rechtsordnungen im Bereich Sicherheit und Gesundheit“, S. 79-82.

⁴³ Kapitel 5.4 „Gesundheit und Sicherheit“, S. 193 – 194.

⁴⁴ Italien, Frankreich, Luxemburg. Siehe Kapitel 3.7, S. 80-82.

Koordinierung verursachen können und Fragen bezüglich ihrer Vereinbarkeit mit dem vorrangigen EU-Recht aufwerfen. Diese Probleme wären in hohem Maße gelöst, wenn alle Mitgliedstaaten ähnliche Zertifizierungs- und Überwachungssysteme hätten, da diese dann gegenseitig anerkannt wären⁴⁵. Leider ist dies nicht der Fall.

Ein anderes Koordinierungsproblem tritt in Bezug auf Haftung bei Unfällen und obligatorische Versicherungen gegen Berufsrisiken auf. Die Mitgliedstaaten haben unterschiedliche Systeme im Umgang mit Berufsrisiken – umfangreiche Abdeckung durch Sozialleistungen, gelegentlich in Kombination mit einer Sperre auf zivilrechtlicher Haftung; Abdeckung gemäß dem Deliktrecht, gelegentlich mit speziellen Beweislastvorschriften; sowie Abdeckung durch spezielle obligatorische Versicherungen, die häufig Bestandteil von Tarifverträgen sind. Derzeit ist die Koordination zwischen den unterschiedlichen Systemen alles andere als perfekt, während die Vereinbarkeit mit EU-Recht auch eine weitere Untersuchung verdient.

Dies gilt ebenso für den Schutz von schwangeren Frauen und Frauen, die kürzlich entbunden haben. Insbesondere die sehr unterschiedlichen Vorschriften im Bereich Sonderurlaub können Koordinierungsprobleme hervorrufen.⁴⁶ Jedoch berichten die Interessenvertreter in dieser Hinsicht von keinerlei Problemen, da die größere Gruppe der entsandten Arbeitnehmer in der Praxis nicht von den Vorschriften betroffen ist. Dies gilt auch für den Schutz von Minderjährigen. Die Antidiskriminierungsvorschriften werden ebenfalls nicht als problematisch beschrieben.

Die Vorschriften zu Leiharbeitsunternehmen dagegen spielen in der Praxis eine Rolle, insbesondere insoweit, als die Mitgliedstaaten diese wirtschaftliche Aktivität Beschränkungen und/oder speziellen Genehmigungen unterwerfen. Obwohl die Anwendung dieser Beschränkungen auf grenzüberschreitende Entsendung mit Artikel 3(1)(d) Entsenderichtlinie vereinbar ist, müssen die Beschränkungen selbst im Lichte von Artikel 4 der Richtlinie zu Leiharbeitsunternehmen evaluiert werden. Die Entsenderichtlinie ermöglicht es auch, den Schutz, der entsandten Arbeitnehmern von Leiharbeitsunternehmen geboten wird, auf das Schutzniveau zu erweitern, das lokalen Arbeitnehmern von Leiharbeitsunternehmen geboten wird (gemäß Artikel 3(9) Entsenderichtlinie). Diese Vorschrift wirkt mit Artikel 5 der Richtlinie zu Leiharbeitsunternehmen zusammen. Die EU ist gut beraten, die Einführung der zuletzt genannten Richtlinie insbesondere in Bezug auf die Stellung des entsandten Arbeitnehmers zu überwachen. (Empfehlung 8, Kapitel 5).⁴⁷

Öffentliche Ordnung Artikel 3(10)

In seinem Urteil in der Sache Kommission gegen Luxemburg vom Juni 2008 (C-319/06) hat der EuGH klargestellt, dass jegliche Erweiterung des Schutzes, die nicht von anderen Überschriften der Richtlinie erfasst ist, aus Gründen der öffentlichen Ordnung gerechtfertigt sein muss. Dementsprechend ist die Relevanz von Artikel 3(10) für einen effektiven Schutz von entsandten Arbeitnehmern unmittelbar verbunden mit

⁴⁵ Empfehlung 18, Kapitel 5.4 „Gesundheit und Sicherheit“, S. 194.

⁴⁶ Siehe Kapitel 3.7 „Auf spezielle Gruppen zugeschnittene Schutzmaßnahmen“, S. 83 – 86, und „Schutz vor Diskriminierung“, S. 86 - 87, sowie Kapitel 5.4 „Andere Schutzbereiche“, insbesondere S. 193-195, und Empfehlungen 19, 20 und 21 für den Schutz von Schwangeren und Frauen, die kürzlich entbunden haben, und S. 194 für den Schutz von Minderjährigen und den Schutz vor Diskriminierung.

⁴⁷ Kapitel 5.3 „Leiharbeitsunternehmen“, S. 185-186.

der Auslegung des harten Kerns des Schutzes gemäß Artikel 3(1). Die nationalen Berichte enthalten diverse Schutzbeispiele, die – in Erwartung der weiteren Klärung der verwendeten Begriffe – entweder dem Begriff der öffentlichen Ordnung zugeordnet oder unter einer der (in Artikel 3(1) genannten) Schutzüberschriften subsummiert werden könnten. Schweden stützt sich nicht auf Artikel 3(1), um die Anwendung seiner Rechtsvorschriften auf dem Gebiet der Teilzeit- und befristeten Arbeitsverhältnisse zu rechtfertigen, da diese als von Artikel 3(1)(g) umfasst gelten. Umgekehrt hat Frankreich über die Verwendung seiner Urlaubskassen gemäß Artikel 3(10) informiert, und zwar in dem Glauben, dass diese eher von diesem Artikel 3(10) als von Artikel 3(1)(b) umfasst werden⁴⁸. Dementsprechend bestünde ein erster Schritt bei der Überprüfung der Effektivität und der Angemessenheit von Artikel 3(10) zur Gewährleistung grundlegender Interessen der Mitgliedstaaten darin, den Anwendungsbereich der in Artikel 3(1) genannten Schutzüberschriften klarzustellen (Empfehlung 22).

Die Möglichkeit, eine der Schutzüberschriften in Artikel 3(1) zu nutzen, scheint für Kollektivarbeitsrechte – so etwa für das Recht, sich zu organisieren, das Streikrecht sowie das Mitbestimmungsrecht – nicht gegeben zu sein. Es überrascht nicht, dass die Mitgliedstaaten mit einem autonomen Arbeitsrechtssystem (UK, SW, DK) all diese Kollektivrechte als Teil von deren öffentlicher Ordnung betrachten, obwohl nur Schweden dies in diesem Sinne der EU mitgeteilt hat. An die Mitgliedstaaten wird appelliert, hinsichtlich der rechtlichen Grundlage, die sie zur Anwendung nationaler Vorschriften nutzen, präziser zu sein und die Anwendung jeglicher Arbeitsschutzmaßnahmen, die nach deren Erwägungen nicht von den in Artikel 3(1) genannten Schutzüberschriften umfasst sind, deutlicher zu bestimmen. Dies wird dazu beitragen, alle problematischen Bereiche im Rahmen der Anwendung von Artikel 3(10) (Empfehlung 23, Kapitel 5) zu benennen.

Schließlich wird das Konzept der öffentlichen Ordnung sowohl im Kontext des freien Dienstleistungsverkehrs als auch im Kontext des internationalen Privatrechts verwendet. Es ist derzeit unklar, ob das im Fallrecht zur Dienstleistungsfreiheit verwendete Konzept der öffentlichen Ordnung auch im Kontext der Rom I Verordnung gültig ist, und wenn nicht, welche Auswirkungen das Konzept des internationalen Privatrechts auf die Auslegung der Entsenderrichtlinie haben kann. Eine weitere Klärung bezüglich dieses Aspekts wäre zu begrüßen (Empfehlung 24, Kapitel 5).⁴⁹

Im Urteil in der Sache Kommission gegen Luxemburg hat der EuGH klargestellt, dass der Begriff der öffentlichen Ordnung restriktiv auszulegen ist. Dies hat einige Mitgliedstaaten ermutigt, ihre Systeme neu zu bewerten (z.B. LUX, DK, SW), um Ungereimtheiten aufzuspüren. Nichtsdestotrotz gibt es in einigen Mitgliedstaaten, darunter UK, IT und BE, noch immer Einführungen, die mit der restriktiven Formulierung von Artikel 3(10) unvereinbar zu sein scheinen. In der Praxis wird in diesen Ländern die übermäßige Anwendung von nationalem Recht durch eine restriktivere Durchsetzungspraxis entschärft, jedoch scheint dies kein Mittel zur Lösung des Problems der Unvereinbarkeit mit EU-Recht zu sein.

⁴⁸ Mehr Beispiele sind zu finden in Kapitel 3.7 S. 89 – 90.

⁴⁹ Kapitel 5.4 „Erweiterung des Schutzes nach Artikel 3(10), S. 196-197.

4. Durchsetzung der Rechte aus der Entsenderichtlinie

Kapitel 4 beschäftigt sich mit Problemen der Überwachung und Durchsetzung von Rechten aus der Entsenderichtlinie. Entsandte Arbeitnehmer treffen auf Schwierigkeiten und Hindernisse, wenn sie die sich aus der Richtlinie ergebenden Rechte durchsetzen wollen. Gleiches gilt auch für die Aufsichtsbehörden in den Gastmitgliedstaaten, wenn sie die Einhaltung der Arbeitsbedingungen nach Artikel 3(1) der Entsenderichtlinie und deren Durchsetzung in der Praxis kontrollieren.

Dieses Kapitel stellt zunächst die verschiedenen an der Durchsetzung beteiligten Akteure – Arbeitnehmer und/oder deren Vertreter sowie nationale Behörden – vor. Es wird zwischen Behörden, die die Einhaltung der durch die Richtlinie garantierten Rechte kontrollieren und solchen, die die Anwesenheit entsandter Arbeitnehmer innerhalb des Hoheitsgebietes überwachen, unterschieden. Anschließend werden die Informationspflichten der überwachenden Instanzen gegenüber der Öffentlichkeit und die Informationspflichten, die diese wiederum Dienstleistern und anderen beteiligten Akteuren auferlegen, untersucht. Ein weiterer Teil der vergleichenden Analyse beschäftigt sich mit den Überwachungs- und Durchsetzungsaktivitäten der Kontrollinstanzen in der Praxis. Dabei geht es um die Häufigkeit von Arbeitsplatzkontrollen; darum, wie Arbeitsaufsichtsbehörde und andere Kontrollinstanzen Selbstständige, die Dienstleistungen im Aufnahmemitgliedstaat erbringen, überprüfen, und wie sie kontrollieren, ob ein Unternehmen im Herkunftsland ordnungsgemäß niedergelassen ist. Des Weiteren werden das Maß der grenzüberschreitenden Zusammenarbeit sowie die Anerkennung ausländischer Strafen/Urteile beleuchtet.

Darüber hinaus wird möglichen rechtlichen oder selbst-regulatorischen präventiven und/oder repressiven Instrumenten zur Förderung der Einhaltung und Durchsetzung besondere Aufmerksamkeit gewidmet. Dabei geht es insbesondere um die gesamtschuldnerische Haftung der Empfänger (Kunden /Hauptunternehmer /verwendende Unternehmen) von Dienstleistungen, die von entsandten Arbeitnehmern erbracht werden, um die Nichtzahlung von Löhnen, Sozialversicherungsbeiträgen und Abgaben durch ihren Arbeitgeber zu verhindern. Zudem werden die Rechtsbehelfe untersucht, die entsandte Arbeitnehmer und ihre Vertreter geltend machen können, ebenso wie alle anderen Unterstützungsinstrumente für entsandte Arbeitnehmer.

Die Erkenntnisse in den nationalen Berichten, die in Kapitel 4 zusammengefasst und analysiert werden, zeigen deutlich und offenbaren die Schwächen in den nationalen Arbeitsrechtssystemen und deren Durchsetzung im Hinblick auf schutzbedürftige Gruppen auf dem Arbeitsmarkt, wie etwa im Hinblick auf entsandte Arbeitnehmer (manche Gruppen davon). Die Einhaltung kann und sollte daher durch die Einführung und Anwendung verschiedener Aufsichts- und Durchsetzungs-„instrumente“ gestärkt werden, die unten aufgelistet sind⁵⁰. Aber auf welcher Ebene sollte dies erfolgen?

Im Gegensatz zu den Bestimmungen in der Entsenderichtlinie bezüglich des persönlichen und des materiellen Anwendungsbereichs der Richtlinie enthält die Entsenderichtlinie keine Betreuungs- oder Mindestpflichten hinsichtlich der

⁵⁰ Für weitere Details siehe Kapitel 5.5, S. 198-203, und Kapitel 5.6, S. 204-213.

Ebene/des Charakters der Überwachung und Durchsetzung (Artikel 5). Daneben wurden nur sehr wenige Pflichten im Hinblick auf die Bereitstellung und den Austausch von Informationen (Artikel 4) oder auch rechtlichen Mitteln für entsandte Arbeitnehmer und/oder deren Vertreter (Artikel 6) festgelegt. Somit wird die Überwachung und Durchsetzung der Entsenderichtlinie zum Zeitpunkt der Erstellung dieser Studie weitestgehend (wenn nicht vollständig) auf dem Niveau basieren, das im nationalen System vorgesehen ist. Im Allgemeinen basiert die Einhaltung des EU-Rechts auf einem dezentralisierten Durchsetzungssystem. Das bedeutet, dass EU-Recht vorwiegend von den nationalen Behörden angewandt und von den nationalen Gerichten gemäß den nationalen (Verfahrens-)Vorschriften gerichtlich entschieden wird. Das bedeutet jedoch nicht (notwendigerweise), dass die Verantwortung der Mitgliedstaaten für die Garantie der Einhaltung von EU-Recht enden sollte, wenn die Grenzen ihrer jeweils eigenen Systeme erreicht sind. Vielmehr haben die Mitgliedstaaten, wie der Rechtsprechung des Europäischen Gerichtshofs zu entnehmen ist, die Verantwortung, den „effet utile“ des Gemeinschaftsrechts zu garantieren. Dies basiert auf dem sogenannten Effektivitätsgrundsatz, der auf Artikel 4(3) Satz 2 und 3 EUV (ehemals Art. 10 EG) beruht. Laut diesem Grundsatz müssen Mitgliedstaaten wirksame, verhältnismäßige und abschreckende Sanktionen einführen, anwenden und durchsetzen, um die Einhaltung von EU-Regelungen wie der Entsenderichtlinie zu gewährleisten. Die gegenwärtige Situation, in der die Schwächen der nationalen Durchsetzungssysteme auch die Schwächen des EU-Rechts im Bereich der Entsendung von Arbeitnehmern sind, muss also nicht einfach als „fait accompli“ hingenommen werden, sondern könnte und sollte, soweit machbar, umgekehrt werden.

In dieser Hinsicht erscheint Unterstützung auf europäischer Ebene unverzichtbar. Vorzugsweise sollten nationale Durchsetzungsinstrumente und -vorschriften in einen europäischen Rechts- und Kooperationsrahmen zwischen den beteiligten Hauptakteuren eingebettet werden, um einerseits ein effektives Level der Einhaltung der Entsenderichtlinie zu garantieren und um andererseits zu verhindern, dass unlauterer Wettbewerb und rechtliche Unklarheiten die grenzüberschreitende Erbringung von Dienstleistungen erschweren.

Beteiligte Akteure

Überwachung der Arbeitsbedingungen (also der Rechte) von entsandten Arbeitnehmern

Der Überblick über nationale Akteure, die an der Überwachung und Durchsetzung beteiligt sind, zeigt ein eher differenziertes Bild. Dies ist im Hinblick auf die Verbesserung der freien Erbringung von Dienstleistungen sowie im Hinblick auf andere Ziele der Richtlinie, nämlich den Schutz von entsandten Arbeitnehmern und das Erfordernis, fairen Wettbewerb zu erhalten, als alles andere als ideal zu bezeichnen. Situationen, in denen mehrere Behörden beteiligt sind (Belgien, Italien, Deutschland) oder (offiziell) überhaupt keine Behörde beteiligt ist (UK), können als besonders problematisch bewertet werden. Darüber hinaus variiert auch der Umfang, in dem öffentliche Behörden an der Überwachung/Durchsetzung von Arbeitsrecht beteiligt sind. Diesbezüglich zeigt sich (wieder einmal) die Anfälligkeit von Systemen, die in hohem Maße auf die privatrechtliche Durchsetzung setzen, da diese zu (missbräuchlichen) Situationen der fehlenden Einhaltung führen kann, in denen

unzuverlässige Dienstleister beteiligt sind (SW, DK, NL, UK im Allgemeinen und DE insbesondere in Bezug auf Gesundheits- und Sicherheitsvorschriften).

Jedoch spiegelt diese Situation die Entscheidung in der Entsenderichtlinie wider, die Überwachung und Durchsetzung der Rechte aus der Richtlinie dem nationalen Level zu überlassen (siehe Artikel 5 Entsenderichtlinie), ohne detaillierte Anforderungen oder Leitlinien (zum Zwecke eines Mindestmaßes an Einheitlichkeit) in Bezug auf die Auswahl bestimmter verantwortlicher Akteure und ihrer Aufgaben. In diesem Sinne wird das Problem nicht nur durch einen Faktor allein verursacht, sondern stattdessen durch das „Schweigen“ auf EU-Ebene in Kombination mit der Anwendung/Durchsetzung der Entsenderichtlinie auf nationaler Ebene. Nichtsdestotrotz indiziert die Tatsache, dass die Richtlinie nicht expliziter ist oder sogar schweigt, nicht, dass Mitgliedstaaten nicht das vorrangige EU-Recht, wie vom Gericht ausgelegt, während der Anwendung nationaler Überwachungs- und Durchsetzungsinstrumente/-systeme anerkennen sollten.

In dieser Hinsicht wird empfohlen, ein höheres Maß an Transparenz bei den Überwachungssystemen der Länder mit mehreren beteiligten Behörden zu schaffen, indem eine Behörde als erste Anlaufstelle bestimmt wird. Darüber hinaus wird die Einführung von mehr staatlichen Durchsetzungsmaßnahmen in Bezug auf Ländern, in denen das nationale System die adäquate Durchsetzung der Rechte entsandter Arbeitnehmer nur unzureichend gewährleistet, vorgeschlagen. Soweit beide Probleme den „effet utile“ der Entsenderichtlinie gefährden, könnten Maßnahmen auf EU-Ebene vorgeschrieben werden (Empfehlungen 25 und 26).

Ein anderes Problem betrifft die Funktionsweise der Überwachungsbehörden. In Deutschland kontrollieren die Zollbehörden speziell die Einhaltung und Durchsetzung von (einem Teil der einschlägigen) Vorschriften zur Entsendung von Arbeitnehmern. Auf regionaler Ebene gibt es 40 Hauptzollämter, die dafür zuständig sind. Im Gegensatz dazu scheint es in allen anderen Gastländern so zu sein, dass die Aufsichtsbehörden sich in erster Linie auf die Überwachung der Einhaltung von nationalem Arbeitsrecht im Allgemeinen konzentrieren. Das bedeutet also, dass keine Durchsetzungskapazitäten speziell zur Überwachung der Einhaltung der Rechte aus der Entsenderichtlinie bereitgestellt werden. Demzufolge handeln Kontrollinstanzen innerhalb ihrer gewöhnlichen Befugnisse; das bedeutet in der Praxis, sie legen im Wesentlichen bestehendes nationales Arbeitsrecht sowohl nach den „Praktiken vor Ort“ als auch nach nationalen Leitlinien nur mit ein begrenztes Bewusstsein für die *Präsenz* und die spezifische Situation von entsandten Arbeitnehmern aus. Somit wäre ein zielgerichteter Fokus auf diese Gruppe bei der Überwachungs- und Durchsetzungspolitik nationaler Behörden erforderlich. Dies kann durch die Einsetzung einer Arbeitsgruppe und/oder durch die Aufstellung von Kontrollleitlinien, die speziell auf die Situation der Entsendung von Arbeitnehmern ausgerichtet sind, erreicht werden (Empfehlungen 27 und 28).

Überwachung der Präsenz entsandter Arbeitnehmer

Die Überwachung der Präsenz entsandter Arbeitnehmer bringt eine eher „ausländerrechterorientierte“ Art der Überwachung (nämlich hinsichtlich des Zugangs zum Hoheitsgebiet eines Staates) mit sich. In diesem Zusammenhang existieren in einigen Mitgliedstaaten durchaus spezifische Überwachungs- und Durchsetzungsinstrumente, die auf die Entsendung von Arbeitnehmern abzielen.

Erwähnt wurden die in allen von dieser Studie umfassten Mitgliedstaaten existierenden Verpflichtungen, den relevanten nationalen Sozialversicherungsbehörden die Entsendung von Arbeitnehmern zu Sozialversicherungszwecken zu melden (E-101-Formulare, basierend auf VO 1408/71 (jetzt VO 883/2004)) oder zu steuerlichen Zwecken zu registrieren. Wir beschränken uns in dieser Studie jedoch auf die (äquivalenten) Verpflichtungen in Bezug auf die Entsendung von Arbeitnehmern im Sinne der Entsenderichtlinie (das heißt, auf die Überwachung der Präsenz von entsandten Arbeitnehmern zum Zwecke der Überwachung der Einhaltung der relevanten, geltenden Arbeitsrechtsvorschriften)⁵¹. Diesbezüglich haben wir herausgefunden, dass in Schweden, Italien, den Niederlanden sowie in Großbritannien im Allgemeinen keine Behörde die Präsenz von entsandten Arbeitnehmern überwacht. In diesen Ländern gibt es keine Dienststellen, die entsandte Arbeitnehmer melden und Informationen zur Anzahl der in ihr Hoheitsgebiet entsandten Arbeitnehmer im Sinne der Entsenderichtlinie sammeln. IT, NL und UK jedoch betreiben Genehmigungs- oder Visapflichtprogramme für (einige) entsandte Arbeitnehmer, die aus Drittländern stammen (zum Zwecke des Ausländerrechts und/oder grenzüberschreitenden Zwecken). Wie bereits oben im Abschnitt „Übergangsrechtsordnungen“ erwähnt, können solche Programme Probleme im Hinblick auf die Vereinbarkeit mit EU-Recht verursachen (unverhältnismäßig sein)⁵².

In diesem Zusammenhang verdient die Frage, ob eine Verpflichtung für Dienstleister zur schlichten Meldung der Präsenz von entsandten Arbeitnehmern als Voraussetzung für die Überwachung der Rechte von Arbeitnehmern gerechtfertigt und verhältnismäßig sein kann, einer weiteren Untersuchung (Empfehlung 27). Belgien, Dänemark, Frankreich, Deutschland und Luxemburg betreiben sehr wohl allgemeine Meldungs- oder „Vordeklarierungs“-programme für entsandte Arbeitnehmer unabhängig von deren Nationalität und spezifischen Entsendungssituation.

Meldepflichten aus Sicht eines Entsendestaates

Bezüglich der vornehmlich entsendenden Staaten Estland, Rumänien, Polen und auch anderer bedeutender Entsendeländer (DE, BE, NL, FR) haben wir uns die Meldepflichten angesehen, die für *aus* ihren Hoheitsgebieten entsandte Arbeitnehmer existieren: In allen Ländern finden nur die Verpflichtungen aus VO 1408/71 / VO 883/2004 Anwendung. Gemäß dieser Verordnung registrieren die zuständigen Behörden in einen anderen Mitgliedstaat entsandte Arbeitnehmer durch Ausgabe von E-101-Formularen an Arbeitgeber. Das (alte) E-101-Formular (jetzt: A1-Formular) hat die Aufgabe, das geltende Recht zur Festlegung der sozialrechtlichen Position von Gastarbeitern, Arbeitnehmern und der Selbstständigen sowie auch die Art und Weise der Zahlung der betreffenden Beiträge anzugeben. Die Informationen im E-101- (A1-) Formular gibt relevante Informationen für die Festlegung der Ansprüche auf

⁵¹ Die Definition der „entsandten Arbeitnehmer“ zu sozialversicherungs- und steuerrechtlichen Zwecken ist nicht vollständig äquivalent zu derjenigen aus der Entsenderichtlinie. Demzufolge decken sich auch die Überwachungsaktivitäten nicht vollständig. Es wäre eine andere (aber empfohlene) Studie im Hinblick auf die Überwachung entsandter Arbeitnehmer aus einem verständlichen Blickwinkel heraus erforderlich (einschließlich aller relevanten rechtlichen Fachbereiche). Siehe Kapitel 4, S. 101-104.

⁵² Siehe S. 16 - 17 dieser Zusammenfassung. Siehe insbesondere den Fall VanderElst (C-43/93), Kommission-Luxemburg (C-445/03), Kommission gegen Österreich (C-168/04) und Kommission gegen Deutschland-Fälle (C-244/04) und die Vicoplus-Fälle (C-307-309/09).

Sozialleistungen⁵³ wieder, nicht jedoch das Gehaltsniveau oder die Arbeitsbedingungen.

Beteiligung von Sozialpartnern und anderen Akteuren

Mit Ausnahme der Gesetzgebung im Bereich Gesundheitsschutz und Sicherheit ist die Überwachung der Einhaltung anderer Gesetze auf dem Gebiet des Arbeitsrechts, ganz zu schweigen von Tarifverträgen, in Dänemark und Schweden nie eine Aufgabe staatlicher Akteure gewesen. Diese wird den Sozialpartnern und – in (den wenigen) Industriezweigen ohne organisierte Sozialpartner – einzelnen Arbeitnehmern überlassen. Somit sind die dänischen und schwedischen Gewerkschaften (in der Praxis) die einzigen Akteure, die die Einhaltung der Vorschriften jenseits derjenigen im Bereich Gesundheitsschutz und Sicherheit am Arbeitsplatz überwachen. Sowohl in der Situation Dänemarks als auch in der Situation Schwedens wurden Zweifel daran geäußert, dass Gewerkschaften in der Lage sind, alle entsandten Arbeitnehmer effektiv zu überwachen. Die Gewerkschaften verfügen nicht über adäquate Ressourcen, um diese Aufgabe wahrzunehmen. Darüber hinaus hängt die Befugnis der Gewerkschaften für die Überwachung, dass entsandte Arbeitnehmer nicht ihrer Rechte beraubt werden, davon ab, ob deren Arbeitgeber oder zumindest der Hauptauftragnehmer an einen Tarifvertrag gebunden ist. Ohne einen Tarifvertrag haben die Gewerkschaften keine Mittel, um auf den Arbeitgeber Druck dahingehend auszuüben, Lohnsätze zu zahlen usw.

Abgesehen von den nordeuropäischen Ländern Dänemark und Schweden sind Sozialpartner an der Überwachung/Durchsetzung der Rechte von entsandten Arbeitnehmern und deren Präsenz nur in (sehr) geringem Maße beteiligt. Wenn Gewerkschaften Ungereimtheiten entdecken, können Sie Maßnahmen innerhalb ihrer Befugnisse ergreifen, so etwa Mediation und Regelung der Situation oder (spontane) Arbeitsk Kampfmaßnahmen; oder sie können die Situation der verantwortlichen nationalen Aufsichtsbehörde melden, die dann weitere Nachforschungen anstellen kann. In allen Ländern wurde beobachtet, dass Sozialpartnern hinreichende (finanzielle) Quellen und Zugang zu Daten fehlen, die für eine adäquate Erfüllung ihrer Aufgaben erforderlich sind. Die meisten nationalen Behörden fühlen sich weder (speziell) für die Überwachung der Einhaltung des Arbeitsrechts auf Tarifvertrag-Ebene verantwortlich, noch kooperieren sie problemlos mit Sozialpartnern. Diese Situation führt eindeutig zu einer fehlenden Überwachung und Durchsetzung von Rechten auf Tarifvertrag-Ebene. Soweit der mögliche Rückgriff auf Kollektivmaßnahmen als Durchsetzungsstrategie genutzt wird, sollte Erwähnung finden, dass in Großbritannien die Gewerkschaften vollständig auf ihre Befugnis zu Kollektivmaßnahmen angewiesen waren (ähnelt sehr den nordischen Ländern). Nach den Viking- und Laval-Entscheidungen jedoch fühlen sie sich auf ihrem Gebiet erheblich beschränkt.

Schließlich ist mehr finanzielle sowie auch institutionelle Unterstützung der Sozialpartner auf nationaler Ebene erforderlich. Davon abgesehen wäre es hilfreich, Mindeststandards – vorzugsweise auf EU-Ebene – für adäquate Überwachung/Durchsetzung von Rechten auf Tarifvertrag-Ebene vorzuschreiben sowie Leitlinien für die Kooperation zwischen den Behörden und Sozialpartnern

⁵³ Krankengeld, Mutterschafts- und Vaterschaftsurlaub, Ruhestand, Erwerbsunfähigkeit, Arbeitsunfälle, Berufskrankheiten, Arbeitsplatz und Familienzuschüsse.

aufzustellen (Empfehlung 31). In dieser Hinsicht können Länder auch von den gegenseitigen „Best Practices“ lernen, dazu gehört etwa die in Estland für eine Überwachungsbehörde eingeführte Verpflichtung, auf eine schriftliche Beschwerde einer Gewerkschaft in Bezug auf Verletzungen des Arbeitsrechts innerhalb von zwei Wochen zu reagieren. Andere inspirierende Praktiken finden sich im italienischen Bericht über (Unterstützung für) lokale Gewerkschaftsinitiativen sowie im niederländischen Bericht über für die Einhaltung zuständige Ämter, die von Sozialpartnern zum Zwecke der Überwachung der Einhaltung ihres Branchen-TV gegründet werden⁵⁴.

Andere beteiligte Akteure

In Deutschland sind auf Unternehmensebene die Betriebsräte verpflichtet, die Einhaltung der allgemein verbindlichen Tarifverträge zu überwachen, die Mindestarbeitsbedingungen in Übereinstimmung mit dem AEntG, dem deutschen Einführungsgesetz, enthalten⁵⁵.

In Großbritannien ist der ACAS, der Advisory, Conciliation and Arbitration Service [Beratungs-, Schlichtungs- und Schiedsstelle] erwähnenswert. Der ACAS ist eine staatliche Einrichtung, die heutzutage dem Trade Union and Labour Relations (Consolidation) Act 1992 unterliegt, das dieser Stelle die allgemeine Pflicht zur Förderung der Verbesserung der Arbeitsbeziehungen auferlegt. Diese Stelle ist befugt, in Tarifkonflikte im Schlichtungs- und Schiedswege einzugreifen, was im Lindsey Oil Refinery-Fall zur Anwendung kam⁵⁶.

Informationspflichten

Bestimmung und Verbreitung von Informationen

Gemäß Artikel 4(3) der Richtlinie sind Überwachungsbehörden dafür zuständig, der allgemeinen Öffentlichkeit Informationen über die Rechte entsandter Arbeitnehmer aus den Gesetzen und (allgemein verbindlichen) TV bereitzustellen. In der Praxis konzentriert sich die Verbreitung von Informationen durch die zuständigen Behörden nur auf die gesetzlich gewährten Rechte. Die Sozialpartner – in der Praxis meistens die Gewerkschaften – sind daran beteiligt, Informationen zu den einschlägigen TV-Vorschriften anzubieten. In der Praxis führt die Aufteilung der Aufgaben zu einem Mangel an Informationen zu den Ansprüchen entsandter Arbeitnehmer auf Tarifvertrag-Ebene. Nur in Dänemark, den Niederlanden und in Schweden wurden Maßnahmen ergriffen, um die geltenden Vorschriften in Bezug auf den harten Kern gemäß Art. 3(1) Entsenderichtlinie auf Tarifvertrag-Ebene zu bestimmen und diese Informationen anschließend der Öffentlichkeit zugänglich zu machen.

Mit Ausnahme von Italien sind in allen untersuchten Ländern Websites die bedeutendste Art der Verbreitung von Informationen, gefolgt von Informationen auf dem Papier, einzelnen Kontaktstellen (oder ‚einheitliche Ansprechpartner‘ verbunden mit der Einführung der Dienstleistungsrichtlinie 2006/123) und speziellen Informationskampagnen. Insbesondere in Bezug auf Informationen in mehreren Sprachen sowie in Bezug auf die Zugänglichkeit der Informationen hat sich die

⁵⁴ Siehe Kapitel 4.2 unter Sozialpartnerbeteiligung, S. 97-99.

⁵⁵ Siehe Kapitel 4.2, S. 100.

⁵⁶ Siehe Kapitel 4.2, S. 100.

Situation im Vergleich zu vor vier Jahren, als die Europäische Kommission in ihrer Mitteilung 159 (2006) die Existenz eines erheblichen Verbesserungspotenzials unterstrich, sichtbar verbessert. Nichtsdestotrotz bleiben weitere Bemühungen, die Zugänglichkeit zu verbessern, Informationen hinreichend zu präzisieren und zu aktualisieren, notwendig, insbesondere in Italien, aber auch auf EU-Ebene (EU-Karteien) (siehe Empfehlung 33).

Ein weiterer Punkt betrifft die Menge der verfügbaren Informationen: Zu viele Informationsquellen können auch die Transparenz gefährden. In dieser Hinsicht wird empfohlen, dass Behörden eine Website/ein Webgate als zentrale Eingangsstelle für die Bereitstellung von Informationen sowohl auf europäischer als auch auf nationaler Ebene bereitstellen (Empfehlung 34).

Eine begrüßenswerte Best Practice war die kürzliche Initiative der European Federation of Building and Woodworkers (EFBWW) [Europäische Föderation der Bau- und Waldarbeiter] und der European Construction Industry Federation (FIEC) [Verband der europäischen Bauwirtschaft], die ein Internetportal mit Informationen zu den für entsandte Arbeitnehmer in der Baubranche geltenden Arbeitsbedingungen eingerichtet haben. Erwähnenswert ist ebenfalls die Bezugnahme im estnischen Bericht auf die Website von EURES, um entsandte Arbeitnehmer über anwendbaren Schutz im Bestimmungsland zu informieren.

Spezielle Projekte

Wie von den nationalen Experten berichtet, sollte beachtet werden, dass entsandte Arbeitnehmer, und zwar insbesondere in den unteren Segmenten des Arbeitsmarktes, möglicherweise keinen Zugang zum Internet haben⁵⁷. Dies macht adäquate Informationen auf Papier und spezielle Informationen sowie aufmerksamkeitsfördernde Kampagnen mit dem Fokus auf entsandte Arbeitnehmer unverzichtbar (Empfehlung 35). In einigen Länderberichten wurden Beispiele für spezielle Aktivitäten der Gewerkschaften genannt, wie etwa ein freiwilliges Projekt mit dem Fokus auf Sprachgruppen unter entsandten Arbeitnehmern (BE), die Herausgabe eines Rundschreibens in Papierform bezüglich des geltenden Rechts in fünf Sprachen sowie befristete Projekte mit der Bezeichnung „Poolshoogte“ (BE) und „Kollega“ (NL). Diese Initiativen wurden ergriffen, um das Wissen bezüglich der Arbeitsweise der Gewerkschaften zu verbessern und um dem speziellen Informationsbedarf auf Seiten polnischer Arbeitnehmer zu entsprechen sowie auch zum Zwecke der Rekrutierung. Jedoch sind diese speziellen Projekte auf Basislevel kostenintensiv und zeitaufwändig. Um diese Initiativen zu fördern und zu erhalten, ist finanzielle Unterstützung und Erleichterung auf EU- und nationaler Ebene eine absolute Grundvoraussetzung.

Verbreitung von Informationen im Entsendestaat

Derzeit wird auf nationaler Ebene nicht viel unternommen, um Informationen zu Arbeitsbedingungen in Gastländern im Herkunftsland der Arbeitnehmer vor deren Entsendung bereitzustellen. In dieser Hinsicht verdienen die jüngsten Initiativen von Gastländern, Informationen auf Arbeitnehmer und Unternehmen in den Entsendestaaten (beispielsweise durch ihre Botschaften) auszurichten, eine Fortsetzung, da Bewusstseins-schärfung so früh wie möglich beginnen sollte, um dem Arbeitnehmer zu ermöglichen, gut informiert eine Entscheidung zur Entsendung zu

⁵⁷ Siehe Kapitel 4., S. 110.

treffen. Um die Erreichung dieses Ziels zu fördern, sollten auch die Behörden in Entsendestaaten angesprochen werden. Gemäß Artikel 4 der Richtlinie 91/533 sind Arbeitgeber (zusätzlich zu der Verpflichtung im Sinne von Artikel 2, einen Angestellten schriftlich über die wesentlichen Aspekte des Vertrages oder Arbeitsverhältnisses zu informieren, einschließlich des Lohnlevels – Basisbetrag und andere Komponenten, bezahlter Urlaub, Länge der Arbeitswoche, einschlägiger Tarifvertrag) verpflichtet, einen Arbeitnehmer, der länger als einen Monat entsandt wird, vor dessen Abreise mindestens über Folgendes zu informieren: (a) die Dauer der Beschäftigung im Ausland; (b) die Währung, in der die Lohnzahlung erfolgt; (c) soweit einschlägig, die Geld- oder Sachleistungen, die mit der Beschäftigung im Ausland verbunden sind; und (d) soweit einschlägig, die Bedingungen, die für die Rückführung des Arbeitnehmers gelten.

In den von dieser Studie umfassten Ländern scheint diese Verpflichtung nur in Estland der Überwachung durch die Arbeitsaufsichtsbehörde in ihrer Rolle als Entsendestaat zu unterliegen. Hier kann das Versäumnis eines Arbeitgebers, Informationen einzureichen, mit einem Bußgeld sanktioniert werden. Diese Good Practice verdient es, von anderen Mitgliedstaaten in deren Rolle als Entsendestaat übernommen zu werden, um deren Pflicht in Bezug auf Informationen zu konstituierenden Elementen der Entsendung zu unterstreichen. Auf EU-Ebene ist unbedingt eine Anpassung der Richtlinie 91/533 zu empfehlen, um eine effektive und abschreckende Sanktion im Falle der Nichteinhaltung der Verpflichtungen aus Artikel 2 und 4 dieser Richtlinie zu etablieren und um ihren Geltungsbereich auf alle von der Entsenderichtlinie umfassten Entsendungssituationen unabhängig von der beabsichtigten Dauer der Entsendung auszuweiten. Darüber hinaus könnte der Dienstleister verpflichtet werden, seine schriftlichen Ausführungen an seine Arbeitnehmer gemäß Richtlinie 91/533 auch den zuständigen nationalen Behörden im Gastland und/oder Entsendestaat zukommen zu lassen⁵⁸. Für den Fall, dass Behörden im Entsendestaat primär zur Verantwortung gezogen würden, sollte die Kooperation mit den zuständigen Behörden im Gastland klar festgelegt werden (Empfehlung 36).

Aktivitäten zur Kontrolle und Durchsetzung

Nationale und grenzüberschreitende Kooperation

Trotz eines erheblichen Fortschritts zeigt die interne Kooperation zwischen nationalen Behörden (einschließlich Sozialpartner), die für die Überwachung der arbeits-, sozial- und steuerrechtlichen Stellung von entsandten Arbeitnehmern und deren Arbeitgebern zuständig sind, noch immer ernsthafte Mängel: Während es in manchen Mitgliedstaaten nach wie vor keine oder nur eine eingeschränkte systematische Kooperation gibt, gibt es in anderen Mitgliedstaaten einen klaren Unterschied zwischen Kooperation auf dem Papier und Kooperation in der Praxis. Dies gilt auch für grenzüberschreitende Kooperation der nationalen Behörden, die an Überwachungs-/Durchsetzungsangelegenheiten in Bezug auf die Entsenderichtlinie beteiligt sind. Die Schwierigkeiten bei der grenzüberschreitenden Kooperation werden

⁵⁸ Eine Verpflichtung zur Einreichung von mit der Richtlinie 91/533/EG konformen Zertifikaten oder zur Einreichung der schriftlichen Arbeitsverträge (Kopien sind ausreichend) der entsandten Arbeitnehmer existiert derzeit in Luxemburg und Deutschland (als Gastländer). Siehe Kapitel 4.3, S. 114.

durch die große Vielfalt der von den zuständigen Behörden in den verschiedenen Ländern ausgeübten Funktionen verursacht (was die Arbeitsaufsichtsbehörde in dem einen Land macht, fällt in einem anderen Land in die Zuständigkeit der Steuerbehörden oder des Finanzministeriums). Daher ist die weitere Einführung/Anwendung der laufenden Initiativen auf EU- und nationaler Ebene in Bezug auf die Verbesserung sowohl der nationalen als auch der (bilateralen) grenzüberschreitenden Kooperation zwischen Aufsichtsbehörden notwendig ⁵⁹ (Empfehlung 29).

Einige Länder haben einen Mangel an Mitarbeitern, die an der Überwachung und Durchsetzung von Aufgaben beteiligt sind, was sich negativ auf die Häufigkeit der Kontrollen auswirken kann. Um ein befriedigendes Level der effektiven, verhältnismäßigen und abschreckenden Durchsetzung zu erreichen oder aufrechtzuerhalten, könnten diese Mängel durch nationale Bemühungen (durch Rekrutierung von mehr qualifizierten Kontrolleuren und Zielsetzungen in Form einer bestimmten Anzahl von Kontrollen je nach Risikobewertung) und/oder auf EU-Ebene durch Vorschreiben angemessener Mindeststandards in einem rechtlichen Instrument verbessert werden. Der Vorteil einer Maßnahme auf EU-Ebene läge darin, dass diese so weit wie möglich die überaus großen Unterschiede zwischen den Mitgliedstaaten auf der Ebene der Durchsetzung der Rechte aus der Entsenderichtlinie reduzieren könnte (Empfehlung 30).

Bewertung des Status des Arbeitnehmers

Ein spezifisches Problem in Bezug auf die Überwachung der Arbeitsbedingungen von entsandten Arbeitnehmern ist die Schwierigkeit, die Behörden gelegentlich bei der Unterscheidung zwischen einem (entsandten) Arbeitnehmer und einer selbstständigen Person (Dienstleister) haben. Diese Schwierigkeit kann sogar in rein nationalen Situationen auftreten, doch in grenzüberschreitenden Situationen sind die Probleme noch gravierender, da möglicherweise unterschiedliche Rechtsordnungen auf diese Kategorien Anwendung finden können. Hinsichtlich des geltenden Sozialversicherungssystems ist der Mitgliedstaat, in dessen Hoheitsgebiet die betroffene Person normalerweise angestellt (selbstständig tätig) ist, verantwortlich für die Bestimmung des Wesens der betreffenden Arbeit (für die Ausgabe des E 101-Zertifikats). Demzufolge ist insoweit, als ein E 101-Zertifikat eine Vermutung dahingehend festlegt, dass die betroffene selbstständige Person korrekt an das Sozialversicherungssystem des Entsendestaates angeschlossen ist, diese Vermutung für die zuständige Stelle des Gastlandes verbindlich. ⁶⁰ Im Rahmen der Entsenderichtlinie ist es umgekehrt: Artikel 2(2) Entsenderichtlinie schreibt vor, dass die Definition eines Arbeitnehmers diejenige ist, die nach dem Recht des Mitgliedsstaates, in dessen Hoheitsgebiet der Arbeitnehmer entsandt wird, Anwendung findet. Somit sollte das Wesen der betreffenden Arbeit gemäß dem Recht des Gastlandes bestimmt werden.

Zu arbeitsrechtlichen Zwecken enthält das niederländische Recht eine widerlegbare Rechtsvermutung eines Arbeitsverhältnisses. Diese Good Practice könnte andere

⁵⁹ Siehe in dieser Hinsicht die Empfehlung der Kommission vom 31. März 2008 zur verbesserten administrativen Kooperation im Rahmen der Entsendung von Arbeitnehmern im Rahmen der Erbringung von Dienstleistungen und der Mitteilungen der Kommission KOM (2006) 159 endgültig 4. April 2006 und KOM (2007)304 endgültig, 13. Juni 2007. Siehe Kapitel 4.6, S. 154-169 für weitere Details zur Kooperation in und zwischen den Mitgliedstaaten.

⁶⁰ Fall C-202/97 (Fitzwilliam Executive Search), p. 53, Case C-178/97 (Banks), p. 40.

Mitgliedstaaten dazu inspirieren, ähnliche Vorschriften einzuführen. Es muss jedoch beachtet werden, dass eine ähnliche (wenn auch strengere) Rechtsvermutung im französischen Recht als unverhältnismäßige Beschränkung des freien Dienstleistungsverkehrs unter Verletzung von EU-Recht, betrachtet wurde⁶¹.

Auch dann, wenn dieses Urteil dazu führen würde, dass die Mitgliedstaaten zögern bei der Verabschiedung einer rechtlichen Vermutung eines Arbeitsverhältnisses in bestimmten Entsendesituationen, könnte der Europäische Gesetzgeber dennoch diese Option erwägen. Dies unterstreicht nochmals die Probleme, die die Mitgliedstaaten bei der effektiven Überwachung der korrekten Anwendung der Richtlinie ohne Verletzung des EU-Rechts haben.

Anerkennung und Umsetzung von ausländischen Urteilen und Entscheidungen

Trotz der Tatsache, dass EU-Maßnahmen die Anerkennung und Umsetzung von ausländischen Urteilen und Entscheidungen regeln, scheint die Durchsetzung von Rechten aus der Entsenderichtlinie noch immer an der nationalen Grenze Halt zu machen. Teilweise liegt dies an einer Gesetzeslücke, und in diesem Umfang sollten zusätzliche Maßnahmen auf nationaler (z. B. in Frankreich) und vielleicht auch auf EU-Ebene ergriffen werden, um die grenzüberschreitende Anerkennung und Umsetzung von Sanktionen, die im Rahmen der Entsenderichtlinie angewendet werden, zu verbessern (Empfehlung 32). Der Vertrag vom 31. Mai 1988 zwischen der Bundesrepublik Deutschland und der Republik Österreich über Amts- und Rechtshilfe in Verwaltungssachen kann als Best Practice genannt werden. Er ermöglicht eine grenzüberschreitende Durchsetzung von administrativen Strafmaßnahmen.

Informationspflichten für Dienstleister

Gemäß Artikel 5 Entsenderichtlinie können nationale Behörden des Gastlandes Dienstleistern und anderen Personen, wie etwa dem Dienstleistungsempfänger und/oder dem entsandten Arbeitnehmer, Informationspflichten auferlegen. Wir haben gesetzliche und selbst-regulatorische Pflichten für Servicedienstleister sowie anderen Akteuren auferlegte Pflichten untersucht. Wir haben jedoch darauf verzichtet, mögliche Pflichten bezüglich der Erteilung von Informationen zur Entsendung von Arbeitnehmern im Gastland zu beschreiben, die nur zu Sozialversicherungs- und Steuerzwecken⁶² sowie zum einzigen Zwecke der Überwachung entsandter Arbeitnehmer mit einer Staatsangehörigkeit aus einem Drittland bestehen (wie teilweise in NL und vollständig in IT, UK).⁶³

⁶¹ Wie vom EuGH im Kontext von Verordnung 1408/71 (nun VO 883/04) ausgelegt. Siehe Fall C-255/04, Kommission gegen Frankreich [2006] ECR-I 5251, para. 48-49. Siehe auch Kapitel 4, S. 157-158, und Kapitel 5, S. 202-203.

⁶² Die Definition der „entsandten Arbeitnehmer“ zu sozialversicherungs- und steuerrechtlichen Zwecken ist nicht vollständig äquivalent zu derjenigen aus der Entsenderichtlinie. Demzufolge decken sich auch die Überwachungsaktivitäten nicht vollständig. Es wäre ein anderer (aber empfohlener) Studienblick auf die Überwachung entsandter Arbeitnehmer aus einem verständlichen Blickwinkel heraus erforderlich (einschließlich aller relevanten rechtlichen Fachbereiche).

⁶³ Informationspflichten zum einzigen Zwecke der Überwachung entsandter Arbeitnehmer mit einer Staatsangehörigkeit aus einem Drittland sind eher Teil des nationalen Ausländerrechts als Teil des nationalen Arbeitsrechts und daher für die Überwachung und Durchsetzung der Entsenderichtlinie als solche nicht relevant.

Meldepflichten

In fünf der neun von dieser Studie umfassten Gastländern (BE, DK, FR, DE, LUX) werden ausländischen Dienstleistern, die Arbeitnehmer entsenden, Meldepflichten auferlegt, um es den verantwortlichen staatlichen Stellen zu ermöglichen, ihre Überwachungs- und Durchsetzungsaufgaben zu erfüllen. Diese Systeme können als Good Practice dahingehend erscheinen, dass die Einführung einer Art von Meldesystem eine Voraussetzung für die Überwachung und Durchsetzung der nationalen Einföhrungsgesetze der Entsenderichtlinie zu sein scheint. Jedoch bedeutet dies nicht, dass darin ein unfehlbares Instrument liegt; erstens können Meldepflichten Probleme bezüglich der Vereinbarkeit mit EU-Recht verursachen (d.h., unverhältnismäßig sein); zweitens weisen viele nationale Interessenvertreter auf das Problem hin, dass viele Dienstleister das Melden „vergaßen“. Nichtsdestotrotz scheinen alle für diese Studie interviewten Interessenvertreter von den Vorteilen dieses Instruments sowohl zu Durchsetzungszwecken als auch zu Leitlinienzwecken überzeugt zu sein. Tatsächlich ist die effektive Festlegung von Leitlinien unmöglich, wenn keine verlässlichen Daten zur Größe und zum Charakter des Phänomens der Entsendung im Rahmen der Entsenderichtlinie existieren. Wenn wie in Belgien ein anwenderfreundliches und leicht zugängliches Meldesystem für die Entsendung von Arbeitnehmern eingeföhrt wird, scheinen die Vorteile die Nachteile zu überwiegen. Die Meldesysteme in Belgien und Dänemark, die auf Entsendung angewendet werden, können in Bezug auf die Ausnahmen, die diese für unbedeutende und spezifische Entsendungen beinhalten, sowie in Bezug auf (BE) Ausnahmen von umfassenderen Informationspflichten ebenfalls als gute Praktiken bezeichnet werden⁶⁴. Diese Instrumente können als Anreiz für Dienstleister, Meldungen durchzuführen, fungieren. Die Pflicht in Deutschland und Luxemburg, die Dokumente einzureichen, die Dienstleister ihren Arbeitnehmern gemäß Richtlinie 91/533 zur Verfügung stellen müssen, und (LUX) die Möglichkeit für „Wiederholungsakteure“, eine Deklaration nur in einer „Light-Version“ einzureichen, können vorbehaltlich einer weiteren Überprüfung im Lichte des Fallrechts des EuGH ebenfalls als Good Practice klassifiziert werden.

In dieser Hinsicht könnte die Entwicklung von einheitlichen Dokumenten in Bezug auf bestimmte Informationspflichten auf EU-Ebene (oder das Bestehen auf einer Vielzahlverwendung der gemäß Art. 2 und Art. 4 der RL 91/533 erforderlichen Dokumente) machbar sein. Davon abgesehen können die Unterschiede zwischen Mitgliedstaaten mit und ohne Meldesysteme sowie auch der unterschiedliche Inhalt von geltenden Meldepflichten Verwirrung und Unsicherheit verursachen. Ob es daher empfehlenswert wäre, ein Meldesystem auf EU-Ebene zu koordinieren, indem die Mindest- und Maximalpflichten eines solchen Systems festgelegt werden, verdient eine weitere Untersuchung, insbesondere in Bezug auf die Effektivität und Verhältnismäßigkeit eines solchen Instruments sowie dessen Auswirkungen im Hinblick auf eine Belastung für die Verwaltungen. Eine Inspiration könnte sich aus Richtlinie 2009/52 sowie aus den alten Vorschlägen ergeben, um eine

⁶⁴ Bitte beachten, dass diese Qualifizierung des belgischen Systems als Best Practice auf die Meldung in Bezug auf die Entsendung von Arbeitnehmern beschränkt ist. Siehe den laufenden EuGH-Fall 577/10 bezüglich der Vereinbarkeit der gleichen, auf Selbstständige angewandten Registrierung/Meldung mit Artikel 56 AEUV.

Aufenthaltsrichtlinie für entsandte Arbeitnehmer zu verabschieden (Empfehlungen 37 und 38)⁶⁵.

Zusätzliche Informationspflichten

Unterschiedliche Situationen in den Mitgliedstaaten existieren auch in Bezug auf zusätzliche Pflichten, wie etwa für die Pflicht zur vorherigen Einholung einer Erlaubnis oder die Pflicht, arbeitnehmerbezogene Dokumente zur Verfügung der Behörden zu halten, oder die Pflicht, einen Vertreter zu bestimmen, was in bestimmten Fällen eine Verletzung von EU-Recht sein kann⁶⁶. In dieser Hinsicht sollten Mitgliedstaaten Best Practices hinsichtlich „ausgeglichenen“⁶⁷, zusätzlicher Pflichten für Dienstleister austauschen. Auf EU-Ebene sollten einheitliche Dokumente in Bezug auf Informationspflichten für Dienstleister entwickelt (oder es sollte auf einer Vielzahlverwendung der in Art. 2 und Art. 4 der RL 91/533 geforderten schriftlichen Angaben bestanden werden (Empfehlung 39).

Einige Unterschiede existieren zwischen den Mitgliedstaaten auch in Bezug auf den Schweregrad und Inhalt von Sanktionen und Bußgeldern. In dieser Hinsicht wurde (grob) beurteilt, dass Luxemburg die besten ausgeglichenen Sanktionen hat, was die Verhältnismäßigkeit einerseits und die Abschreckung (oder sogar Wirtschaftlichkeitsfreundlichkeit) andererseits angeht. Hier werden keine administrativen Strafen auferlegt, sondern eher zahlreiche Einhaltungsanordnungen. Ein weiterer Vorteil dieser Art von Sanktionierung liegt darin, dass sie ein Fehlen von Ergebnissen „am Ende des Tages“ vermeiden, wie in einigen anderen Mitgliedstaaten (Belgien, Frankreich, Italien), in denen überwiegend strafrechtliche Sanktionen existieren, angemerkt. In solchen Systemen führt eine Meldung über eine Zuwiderhandlung nicht zwingend zu einer Anklage, da der Staatsanwalt häufig seine Prioritäten nicht zu Gunsten der Verfolgung von Zuwiderhandlungen bezüglich der Entsendung von Arbeitnehmern zu setzen scheint.

Selbst-regulierende Informationspflichten für Dienstleister

In einigen Mitgliedstaaten (Dänemark, Italien und UK) beinhalten Tarifverträge Pflichten für ausländische Dienstleister dahingehend, auf Wunsch der örtlichen Zweigstelle der Gewerkschaft Zahlungsbelege und Arbeitsverträge oder Unterlagen zu den Arbeitsbedingungen bereitzustellen. Solche Initiativen können – selbstverständlich soweit der Inhalt der TV-Maßnahmen nicht unverhältnismäßig ist oder gegen EU-Recht verstößt (d.h., weder zu starr noch zu locker ist) – als Good Practice, als Tool zur Verbesserung der Einhaltung der Entsenderichtlinie auf der TV-Ebene begrüßt und ausgetauscht werden (Empfehlung 40).

Beschwerdeverfahren für Dienstleister

Ausländische Dienstleister können bei Beschwerden über die Anwendung und Durchsetzung der Vorschriften zur Entsendung von Arbeitnehmern durch die Behörden die nationale Kontaktstelle des Internal Market Problem Solving Network (SOLVIT) kontaktieren. Es scheint besonders in Polen der Fall zu sein, dass dieses Beschwerdeverfahren zufriedenstellend funktioniert hat, doch in der Mehrheit der von dieser Studie umfassten Mitgliedstaaten wurde festgestellt, dass das Verfahren nicht sehr bekannt ist und möglicherweise in zu geringem Umfang genutzt wird. Davon

⁶⁵ Siehe KOM (1999) 3 und KOM (2000) 271.

⁶⁶ Siehe Kapitel 4, S. 117 – 123, auch in Bezug auf die SOLVIT-Beschwerden, S. 151 – 153.

⁶⁷ Zwischen übermäßig starren (unverhältnismäßigen) und übermäßig lockeren (nicht abschreckenden oder abwertenden) Regelungen.

abgesehen hat es sich in mehreren Mitgliedstaaten als äußerst schwierig erwiesen, Zugang zu Informationen zum Wesen der Beschwerden von den SOLVIT-Niederlassungen zu bekommen.

Pflichten für den Dienstleistungsempfänger

Informationspflichten, die Dienstleistungsempfängern auferlegt werden

In einigen Ländern (Belgien, Dänemark in Bezug auf bestimmte Risikobereiche) müssen Empfänger der Dienstleistung überprüfen, ob ausländische Dienstleister – insbesondere in ihrer Rolle als ausländische(r) Subunternehmer/Zeitarbeitsunternehmen – ihre Meldepflichten erfüllt haben. Im Falle der Nichteinhaltung muss das Empfänger-/Nutzerunternehmen dies der zuständigen nationalen Stelle melden. Wenn der Dienstleistungsempfänger die Nichteinhaltung meldet, ist er haftungsbefreit, anderenfalls jedoch kann er mit einem Bußgeld belegt werden. Einige Informationspflichten für den Empfänger der Dienstleistung bestehen auch auf TV-Ebene, insbesondere in der Baubranche, die beispielsweise von der Einführung der Richtlinie 92/57/EWG über die auf zeitlich begrenzte oder ortsveränderliche Baustellen anzuwendenden Mindestvorschriften für die Sicherheit und den Gesundheitsschutz. Angesichts des Problems der Nichtmeldung haben Dienstleister in mehreren Mitgliedstaaten bekundet, es sei verständlich, dass der Dienstleistungsempfänger bis zu einem gewissen Grad mitverantwortlich gemacht werde. Um also die Effektivität von Meldeprogrammen zu verbessern, können diese Initiativen als Good Practice, nämlich als Tool zur Verbesserung der Einhaltung der Entsenderrichtlinie einschließlich der TV-Ebene, begrüßt und ausgetauscht werden. Nichtsdestotrotz verdienen die Vereinbarkeit mit EU-Recht insbesondere in Bezug auf die Effektivität und Verhältnismäßigkeit eines solchen Instruments und die Konsequenzen im Hinblick auf die Belastung für Verwaltungen eine weitere Untersuchung.

Haftung des Dienstleistungsempfängers (oder „funktionaler Äquivalente“)

In fünf der neun Gastländer in unserer Studie (in Belgien, Frankreich, Deutschland, Italien, den Niederlanden) gibt es rechtliche und gelegentlich auch selbst-regulatorische Mechanismen zur endgültigen Haftung, insbesondere in Form der gesamtschuldnerischen Haftung, um die Nichtzahlung von Löhnen (in allen Ländern außer Belgien), Sozialversicherungsbeiträgen (in allen Ländern) und Steuerabgaben (in Belgien, Frankreich, den Niederlanden und teilweise in Dänemark) zu verhindern.

In einigen Ländern wurden mehrere Instrumente entwickelt, um entweder die Möglichkeit einer Haftung unter den relevanten Parteien zu verhindern oder diejenigen Parteien zu bestrafen, die die Vorschriften nicht befolgen. Die präventiven Instrumente können auf die allgemeine Zuverlässigkeit der Subunternehmerpartei zugeschnitten werden und/oder dem Zweck dienen, die Lohnzahlungen sowie die Zahlung der Sozialversicherungsbeiträge und Lohnsteuern zu garantieren. Parteien, die sich nicht an die Vorschriften der verfügbaren Haftungsausgestaltungen halten, können mittels einiger *repressiver Instrumente* bestraft werden, nämlich mittels: Rückzahlungspflichten (Dänemark, Frankreich, Italien, die Niederlande), Geldbußen (Belgien, Dänemark, Frankreich) und/oder alternativer oder zusätzlicher Sanktionen (Deutschland, Frankreich, Italien). In anderen Gastländern (insbesondere Schweden,

Luxemburg und in gewisser Hinsicht auch UK) bestehen alternative Maßnahmen (funktionale Äquivalente), die auf die gleichen Ziele ausgerichtet sind.

Für eine umfassende Beschreibung der Haftungssysteme in den fünf genannten Ländern verweisen wir auf die Studie zu „Liability in subcontracting processes in the European construction sector“, die 2008 von der European Foundation for the Improvement of Living and Working Conditions (Dublin Foundation) veröffentlicht wurde. Eine der Erkenntnisse dieser Studie war der Umstand, dass die Haftungsvorschriften in den von dieser Studie umfassten Mitgliedstaaten in betrügerischen und missbräuchlichen Situationen, die den entsandten Arbeitnehmer treffen, in grenzüberschreitenden Situationen oder in Bezug auf subunternehmerische Art und Leiharbeit so gut wie überhaupt nichts bewirken.

Die Frage, ob es praktikabel wäre, Mindeststandards auf EU-Ebene in Bezug auf Pflichten (einschließlich Haftung) für Dienstleistungsempfänger im Rahmen der Entsenderichtlinie zu verabschieden, verdient eine weitere Untersuchung, insbesondere im Hinblick auf funktionale Äquivalente, die es in nicht von dieser Studie umfassten Mitgliedstaaten gibt, sowie im Hinblick auf die Effektivität dieser Instrumente (Empfehlung 41).

Unterstützende Instrumente/Mittel, die entsandten Arbeitnehmern zur Verfügung stehen

Unter dieser Überschrift haben wir zuerst die rechtlichen Mittel für entsandte Arbeitnehmer und/oder deren Vertreter untersucht, die es ermöglichen, die Rechte aus der Entsenderichtlinie durchzusetzen. Gemäß Artikel 6 der Entsenderichtlinie muss der entsandte Arbeitnehmer zur Durchsetzung des Rechts auf die in Artikel 3 gewährleisteten Arbeits- und Beschäftigungsbedingungen eine Klage in dem Mitgliedstaat erheben können, in dessen Hoheitsgebiet der Arbeitnehmer entsandt ist oder war, wobei dies nicht die Möglichkeit, gegebenenfalls gemäß den geltenden internationalen Übereinkommen/Verordnungen über die gerichtliche Zuständigkeit in einem anderen Staat, wie etwa in dem Staat, in dem er für gewöhnlich seinen Arbeitsvertrag erfüllt, Klage zu erheben. Somit mussten alle Mitgliedstaaten sicherstellen, dass Arbeitnehmer, die in ihr von der Richtlinie umfasstes Land entsandt werden, zum Zweck der Durchsetzung in dem Hoheitsgebiet, in das sie entsandt wurden, eine Klage erheben können. Mit Ausnahme von Großbritannien ist Artikel 6 der Entsenderichtlinie explizit in allen von dieser Studie umfassten Mitgliedstaaten umgesetzt worden. In Großbritannien sind die von der Entsenderichtlinie umfassten Entsendungssituationen sowie die aus der Richtlinie abgeleiteten Rechte nicht eindeutig im nationalen Recht wiedergegeben worden, daher ist die Klausel zur gerichtlichen Zuständigkeit aus Artikel 6 der Richtlinie nicht korrekt umgesetzt worden. Nichtsdestotrotz können EU-Arbeitnehmer⁶⁸, die nach Großbritannien entsandt werden, eine Klage etwa in Bezug auf ungerechtfertigte Entlassung, Nichtzahlung des Mindestlohns oder Diskriminierung wegen Behinderung beim

⁶⁸ Es ist nicht klar, ob dies die Ausnahme von Arbeitnehmern mit einer Staatsangehörigkeit aus einem Drittland impliziert.

Employment Tribunal [Arbeitsgericht] einreichen, da in Großbritannien entsandte Arbeitnehmer den gleichen Schutz genießen wie nicht-entsandte Arbeitnehmer⁶⁹.

Klagebefugnis für Sozialpartner und einzelne entsandte Arbeitnehmer

Mehrere Mitgliedstaaten (Belgien, Frankreich, die Niederlande) haben die Klausel zur gerichtlichen Zuständigkeit nicht nur in Bezug auf den einzelnen entsandten Arbeitnehmer umgesetzt, sondern *unabhängig von dem einzelnen Arbeitnehmer* auch für Arbeitnehmer- und Arbeitgebervertreterorganisationen, wobei das Recht eines entsandten Arbeitnehmers, selbst eine gerichtliche Maßnahme zu ergreifen, sich einer gerichtlichen Maßnahme anzuschließen oder in eine gerichtliche Maßnahme einzugreifen, davon unberührt bleibt. Da Gewerkschaften (und Arbeitgeberverbände) im Gastland ein eigenständiges Interesse an der Durchsetzung der im Gastland für ausländische Dienstleister geltenden arbeitsrechtlichen Standards haben können, kann dies als Good Practice klassifiziert werden, die es verdient, von anderen Mitgliedstaaten übernommen zu werden. Auf EU-Ebene wäre eine Anpassung von Artikel 6 Entsenderichtlinie dahingehend, die Option, Sozialpartnern eine Klagebefugnis zu gewähren, in eine Verpflichtung umzuwandeln, empfehlenswert. Davon abgesehen muss die Formulierung von Artikel 6 Entsenderichtlinie auch verdeutlichen, dass die Mitgliedstaaten verpflichtet sind, einzelnen entsandten Arbeitnehmern eine Klagebefugnis für die Gerichte im Gastland zu gewähren. Derzeit ist dies in Schweden nicht der Fall.

In diesem Zusammenhang verdienen auch das unabhängige Recht der Kassen, Klagen bei Gericht einzureichen, sowie die recht effektive und häufige Inanspruchnahme dieses Rechts in der Praxis durch die deutsche ULAK [Urlaubs- und Lohnausgleichkasse der Bauwirtschaft] Erwähnung. Wenn nicht bereits geschehen, könnten Mitgliedstaaten die Möglichkeit der Ermächtigung eines zuständigen Akteurs/einer zuständigen Behörde zur Erhebung einer Klage gegen einen nicht rechtstreuen Arbeitgeber (etwa zum Zwecke der Eintreibung ausstehender Löhne) und den darin enthaltenen Mehrwert erwägen (Empfehlung 42).

Zugang zu Rechtshilfe für entsandte Arbeitnehmer

Entsandte Arbeitnehmer (obwohl nicht im Gastland ansässig oder wohnhaft) haben den gleichen Zugang zu den in Belgien, Frankreich, Deutschland, den Niederlanden, in Luxemburg sowie in Schweden gesetzlich gewährten Rechtshilfemechanismen, solange diese die Staatsangehörigkeit eines EU-Mitgliedstaates besitzen oder regelmäßig in einem anderen Mitgliedstaat der EU (außer Dänemark) ansässig oder wohnhaft sind. Gemäß den allgemeinen, in Großbritannien für arbeitsrechtliche Fälle geltenden Grundsätzen jedoch stünde entsandten Arbeitnehmern dort keinerlei Rechtshilfe zur Verfügung. Auch haben nach Rumänien entsandte Arbeitnehmer keinen Zugang zu Rechtshilfe, davon ausgenommen ist die Rechtshilfe, die möglicherweise von der Gewerkschaft bereitgestellt wird. Obwohl diese Erkenntnisse im Einklang mit EU-Recht (insbesondere mit der Rechtshilferechtlinie) stehen, könnte es empfehlenswert sein, beispielsweise im Wege einer EU-Mitteilung, Zugang zu Rechtshilfe für (entsandte) Arbeitnehmer in Ländern zu gewähren, in denen diese Rechtshilfe derzeit nicht verfügbar ist (Empfehlung 43).

⁶⁹ Siehe: <http://www.thompsons.law.co.uk/lttext/10640005.htm>

Fehlende Inanspruchnahme der Klausel zur gerichtlichen Zuständigkeit durch entsandte Arbeitnehmer

In allen aufnehmenden Mitgliedstaaten scheint es so zu sein, dass entsandte Arbeitnehmer oder ihre Vertreter das Recht zur Ergreifung rechtlicher Maßnahmen bisher kaum oder sogar nie in Anspruch genommen haben (mit der möglichen Ausnahme Deutschland, vergleiche Anhang II und III). Vor dem Hintergrund des überzeugenden (wenn auch anekdotischen) Beweises für (missbräuchliche) Fälle der Nichteinhaltung, wie in den nationalen Berichten niedergelegt (siehe Abschnitt 3.5 und Anhang I), muss dies als klares Signal dafür gedeutet werden, dass die bloße Klausel zur gerichtlichen Zuständigkeit in der Entsenderichtlinie nicht ausreicht, um effektive rechtliche Mittel zu gewährleisten. Wie mehrere nationale Berichte folgern, scheinen die meisten einzelnen entsandten Arbeitnehmer in der Praxis nur dann aktiv zu werden, wenn sie keine andere Wahl haben. Dies gilt für schwerwiegende Arbeitsunfälle (die auch überlebende Verwandte und/oder schockierte Kollegen dazu bewegen können, Maßnahmen zu ergreifen) oder dann, wenn überhaupt kein Lohn gezahlt wird und die Arbeitnehmer nicht einmal ihren Lebensunterhalt bestreiten können. Im zuletzt genannten Fall kann es häufig so sein, dass der unmittelbare Arbeitgeber verschwunden oder unauffindbar ist.

Die Hauptgründe für diese passive und unbeteiligte Haltung von entsandten Arbeitnehmern sind in ihrer häufig schutzbedürftigen oder spezifischen, sozialwirtschaftlichen und gesellschaftlichen Position zu finden. Demzufolge ist das Problem hauptsächlich anderen Gründen als der unzureichenden Einführung, Anwendung oder Durchsetzung der Entsenderichtlinie auf nationaler Ebene oder als der Entsenderichtlinie an sich geschuldet. Dies soll nicht heißen, dass in rechtlicher Hinsicht nichts unternommen werden sollte. Soweit verfahrenstechnische Probleme aufgespürt werden (in einigen nationalen Berichten), sollten gewiss Bemühungen zu deren Behebung unternommen werden. Jedoch ist der in diesem Zusammenhang zu betonende Hauptaspekt die unverzichtbare Rolle von Gewerkschaften, die, wie in Abschnitt 3.2 und 4.5 dargestellt, versuchen, entsandte Arbeitnehmer zusammen mit anderen Akteuren auf Basislevel zu erreichen und zu „ermächtigen“. Berichte sowohl über wilde als auch über organisierte Streiks im Namen entsandter Arbeitnehmer sind erwähnenswert. Gleichzeitig hat sich herausgestellt, dass Bemühungen, entsandte Arbeitnehmer gewerkschaftlich zu organisieren, nicht sehr erfolgreich sind, hauptsächlich aus anderen als rechtlichen Gründen (Desinteresse / Angst / Misstrauen gegenüber Gewerkschaften oder schlechte Erfahrung / Image im Herkunftsland, Kosten für Mitgliedschaft). Nichtsdestotrotz gibt es auch Anzeichen für Erfolg durch ein steigendes Bewusstsein insbesondere auf Seiten polnischer entsandter Arbeitnehmer, was darauf schließen lässt, dass Gewerkschaftsbemühungen aufrechterhalten und nicht aufgrund des Fehlens finanzieller Mittel abgebrochen wurden (wie in mehreren Berichten ebenfalls angemerkt). Aus diesem Grund ist es aus unserer Sicht wichtig, die langfristige Notwendigkeit, Initiativen von Gewerkschaften (und/oder Sozialpartnern) in dieser Hinsicht strukturell zu fördern und zu unterstützen, besonders zu betonen (Empfehlung 44).

Beschwerdeverfahren

Keines der untersuchten Länder hat spezifische Beschwerdeverfahren, die es entsandten Arbeitnehmern ermöglichen, Beschwerden über die Nichteinhaltung der Entsenderichtlinie einzureichen. Entsandte Arbeitnehmer können die gleichen Beschwerdemethoden nutzen wie jeder anderer Arbeitnehmer in diesen Ländern, wie

etwa Kontaktaufnahme mit den Gewerkschaften oder mit den für Arbeitsaufsicht zuständigen Stellen anlässlich ihrer Beschwerden. Jedoch können die nach der allgemeinen nationalen Rechtsordnung verfügbaren Beschwerdeverfahren nicht als für entsandte Arbeitnehmer verständlich und zugänglich angesehen werden (nichtsdestotrotz darf die Rolle des ACAS im *kollektiven* Lindsey Oil Refinery-Streitfall nicht unterschätzt werden). Folglich beschweren sich in der Praxis die entsandten Arbeitnehmer nicht über die Nichteinhaltung und missbräuchliche Situationen, in einigen Fällen deshalb, weil sie auch Angst davor haben, denn eine Beschwerde könnte sie den Job kosten. Es wird empfohlen, dass das Fehlen von ausgewiesenen Beschwerdeverfahren auf nationaler Ebene behoben wird. Auch auf EU-Ebene wäre es empfehlenswert, ein Beschwerdeverfahren, das speziell auf entsandte Arbeitnehmer abzielt, zu fördern und/oder zu initiieren (Empfehlung 45).

5. Abschließende Bemerkungen

In dieser Zusammenfassung unserer vergleichenden Studie, die auf zwölf nationalen Berichten basiert, konnten wir nur eine sehr kurze Darstellung unserer umfassenden Studie über die bestehenden Probleme bei der Einführung, Anwendung und Durchsetzung der Richtlinie (siehe Abschnitt 2, 3 und 4) leisten. Jedoch konnten wir in diese Zusammenfassung den größten Teil der Analyse der Gründe für die Probleme ebenso wie unsere Hauptempfehlungen einschließlich der Klassifizierung von Best Practices (siehe Abschnitt 5) einbringen.

Im Allgemeinen laufen viele unserer Empfehlungen auf Klarstellung hinaus und auf eine präzisere Anwendung der Konzepte und Standards in der Entsenderichtlinie, um die praktischen Effekt der Richtlinie zu verbessern. Im Idealfall muss die Klarstellung hauptsächlich auf EU-Ebene, die möglichst präzise und korrekte Anwendung auf nationaler Ebene erfolgen. Insbesondere soweit es um Probleme bei der Anwendung und Durchsetzung der Entsenderichtlinie geht, empfehlen wir auch die Entwicklung neuer Rechts- und Leitlinieninstrumente. Auf nationaler Ebene kann viel getan werden, doch im Hinblick auf den Grundsatz der Effektivität gemäß dem EUV erscheinen (zusätzliche) rechtliche Maßnahmen auf europäischer Ebene unverzichtbar.

Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union

to the European Commission
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CHAPTER 1. Introduction

1.1 BACKGROUND AND POLICY CONTEXT

As early judgments of the European Court of Justice in the cases *Manpower* (35/70) and *Van der Vecht* (19/67) show, employee posting was already a phenomenon in the late 1960s and early 1970s, even before the internal market was launched. The practice of hiring a (temporary agency) worker from a country with a ‘cheaper’ social security scheme, with the sole purpose of posting him to a Member State with a more expensive social security regime, were at that time labelled abusive and ‘social dumping’. In the first half of the 1990s, in the context of the Delors project ‘Europe 1992’ for completing the single market, the proposal for a Posting of Workers Directive and the underlying question of the extent to which Member States must be allowed or should be required to apply their mandatory wages and other working conditions to workers posted to their territory, led to fierce debates in European Parliament and Council.¹

It was only after a six-year process of negotiations, deadlocks and amended proposals that the Posting of Workers Directive was finally adopted. One of the controversies concerned the legal basis of the Directive, which was found in the Treaty provisions establishing the freedom to provide services. In fact, the ECJ judgment in the case *Rush Portuguesa* of 1990 paved the way for this legal base. In this case, the ECJ ruled (at para 15) that ‘an undertaking established in one Member State providing services in the construction and public works sector in another Member State may move with its own work-force which it brings from its own Member State for the duration of the work in question.’ With regard to the terms and conditions of employment of the posted worker, the ECJ stated (at para 18) that ‘Community Law does not preclude Member States from extending their legislation, or collective labour agreements, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established.’²

With regard to both considerations two – separate - lines of case law were developed: (1) The first one (building on para. 15 of *Rush*) concerned the unjustified restrictions on the freedom of a service provider established in a Member State to post workers possessing a third- country nationality to another Member State. In this regard, the ECJ ruled that the authorities of the host state may not impose conditions relating to obtaining work permits, since posted workers who are regularly employed by the service provider and only temporarily in the host country for the duration of the service are not deemed to enter the labour market of that state. However, a duty to notify the presence of a posted worker to the host state authorities was allowed, under certain conditions.³ This line of case law was not influenced by the adoption and consequent implementation of the PWD, as the

¹ See for instance OJ 15, C 166/123.6.95, no. 4-464/204 and no. 4-464/206.

² See Case C-113/89 (*Rush Portuguesa*), points 19 and 18.

³ See Cases C-43/93 (*VanderElst*); C-244/04 (*Commission v Germany*); C-445/03 (*Commission v Lux*); C-168/04 (*Commission v Austria*).

Directive does not regulate the presence of (third country national) posted workers but only coordinates which hard core of mandatory host state labour standards should be applicable to workers.

(2) The second line of case law (building on para. 18 of Rush) concerns conflicts involving the wages and other working conditions of posted workers. Many aspects were touched on, but the main approach in these judgments starts with a comparison of labour law protection in the host state and that in the state where the worker is normally employed. If the protection is the same or 'in essence' the same, the social protection of the latter state has priority. A precondition for the application of host-state law is that it offers the posted worker a genuine and effective advantage and that it does not disproportionally restrict the free movement of services.⁴

The position of workers who are posted to another Member State in the framework of the provision of services has thus been a European concern for a considerable time. The Posting of Workers Directive (PWD), adopted on 16 December 1996, is one of the tangible results of this concern. The PWD aims to reconcile the exercise of companies' fundamental freedom to provide cross-border services under Article 56 TFEU (old art. 49 EC), on the one hand, with the need to ensure a climate of fair competition and respect for the rights of workers (Recital 5). The European Commission has regularly monitored the implementation of this Directive to ensure that the aims of the Directive were being met. The group of Experts, installed by the Commission as proposed in their Evaluation of July 2003,⁵ took up the improvement of mutual administrative cooperation. Data concerning the persons to contact at the Ministries and liaison offices were exchanged, and the intention was to keep this information up-to-date. Moreover, the Member States were strongly recommended to improve the general public's access to this information.⁶

The comprehensive monitoring exercise launched by the European Commission in 2006,⁷ must be situated against the debate about the then draft Services Directive.⁸ With regard to the possible tension between the application of internal market rules and the need to respect the protection of the rights of workers by means of administrative requirements and control measures, guidelines were adopted to clarify the prevailing Community law,⁹ which were, as a matter of fact, partly based on deleted proposals for restricting national possibilities to monitor and enforce the PWD in the draft Services Directive. Directive 2006/123/EC, as adopted, does not deal with labour law or the posting of workers within

⁴ See ECJ judgments in cases C-164/99 (Portugaia); C-165/98 (Mazzoleni); C-49/98, C-50/98, C-52/98 - 54/98, 68/98, 71/98 (Finalarte); C-366/96 and C-369/96 (Arblade); C-272/94 (Guiot). In all these rulings the facts of the case date from the period that the PWD was not adopted yet or still subject to implementation and thus not (fully) applicable.

⁵ See COM (2003) 458 of 25 July 2003, p.19/20.

⁶ See COM (2003) 458 of 25 July 2003, p.19/20.

⁷ COM (2006) 159 and the accompanying Staff Working Document SEC (2006) 439, as well as the follow-up communication COM (2007) 304, "Posting of workers in the framework of the provision of services: Maximising its benefits and potential while guaranteeing the protection of workers" and the accompanying Staff Working Document SEC (2007) 747.

⁸ See for instance 14.02.2006 Commissioner Charlie McCreevy's Statement on the Services Directive at the European Parliament Plenary session of February 2006; SPEECH/06/84.

⁹ COM (2006) 159, "Guidance on the posting of workers within the framework of the provision of services" and the accompanying Staff Working Document SEC (2006) 439.

the EU, since these were deemed matters that were specifically to be dealt with in the PWD and the Rome I Convention.¹⁰

Based on the results of the comprehensive monitoring exercise, the assessment was that the Directive's main shortcomings – if not all of them – could be traced to a range of issues relating to its implementation, application and enforcement in practice. The policy documents showed that many Member States rely solely on their own national measures and instruments to control service providers, in a way that does not always appear to be in conformity with either (old) Article 49 EC (now Art. 56 TFEU), as interpreted by the European Court of Justice (ECJ), or with the Directive. This situation was related to the virtual absence of administrative cooperation, unsatisfactory access to information, and cross-border enforcement problems.

To put the evolving debate about the implementation, application and enforcement of the PWD into the correct perspective, it should be noted here that the 2004 proposal for what was commonly referred to in the popular press as the ‘Bolkestein Directive’, together with the EU’s enlargement in 2004 and 2007 by 12 new Member States, has played an important role in attracting attention to the restrictive practical impact of the PWD.¹¹ Moreover, the judgments of the ECJ in the Viking-Line, Laval, Rüffert and Commission against Luxembourg cases in 2007 and 2008, all fuelled intense scholarly and public debate¹² on the implementation and application of the PWD and, inter alia, led to a quest for clarification on a number of points. In the meantime, the issue of posting workers also led to intense debate in the European Parliament, which adopted several resolutions on the issue.¹³ The last of these, dating from 2008, stresses (once again) the need to correctly implement, apply and enforce the Directive.¹⁴ In this resolution, the European Parliament asks the Commission to continue examining the problems in this context, suggesting that a partial revision of the Directive should not be ruled out.

In line with the conclusions laid out in its Communication of October 2007, the European Commission considered that urgent action is required to remedy shortcomings in

¹⁰ The Services Directive, after being substantially amended from the original proposal, was adopted on 12 December 2006 by the Council and the European Parliament, and published on the Official Journal of the European Union on 27 December 2006 as the Directive 2006/123/EC.

¹¹ See for an account of the ‘integration fatigue’ and ‘(single) market fatigue’ in the old Member States in western Europe due to the enlargements and the unemployment and discrediting of financial capitalism in the credit crisis, the recent report of Mario Monti, A new strategy for the single market, at the service of Europe’s economy and society, May 2010.

¹² The ‘Laval-quartet’ gave rise to numerous conferences among scholars and policymakers and led to a ‘tsunami’ of (working) papers and articles in Academic journals. See also many ETUC press releases and reports on the aftermath of this case law.

¹³ European Parliament resolution on the implementation of Directive in the Member States (2003/2168(INI), OJ C 92E, 16.4.2004, p. 404-407; Resolution on the application of Directive 96/71/EC on the posting of workers (2006/2038(INI)), OJ C 313E, 20.12.2006, p. 452-457; Resolution of 11 July 2007 on the Commission Communication on the Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers (P6_TA(2007)0340).

¹⁴ European Parliament resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI)).

implementing, applying and enforcing the PWD. It recognizes that properly functioning administrative cooperation among the Member States is essential for monitoring compliance. However, it also considers that the problems encountered cannot be resolved unless the Member States improve the way they cooperate with each other and, in particular, comply with their obligations regarding administrative cooperation and access to information under the Directive. Thus, on 3 April 2008,¹⁵ the Commission published a Recommendation calling on Member States to take urgent action to improve the situation of posted workers through better cooperation between national administrations. It sets out a series of practical measures to remedy shortcomings in the way the existing legislation is implemented, applied and enforced. It calls in particular for a more effective exchange of information, better access to information and exchange of best practice. The Recommendation was endorsed by Council conclusions on 9 June 2008, and followed up by a Commission Decision on 19 December 2008, establishing an Expert Group on the Posting of Workers.

In July 2009, the European Commission launched a pilot project ‘working and living conditions of posted workers’. In the context of this project, two research projects were commissioned, which took off in December 2009/January 2010. One concerned the economic and social effects associated with the phenomenon of posting workers in the European Union (VT/2009/62). The other (VT/2009/63) concerns the legal aspects of posting workers in the framework of the provision of services in the European Union, of which the present study is the outcome.

With a view to improving the legal and practical situation in the Member States, this study (see especially chapters 3 and 4) examines the main problems regarding the implementation, application and enforcement of the Directive 96/71/EC on the Posting of Workers (hereinafter PWD or ‘the Directive’) in the context of the cross-border provision of services. As is evident from the above, this is not the first time that problems concerning the PWD have been addressed. Nevertheless, a comprehensive and systematic review of the implementation, application and enforcement of the PWD in the twelve Member States involved in this study has not been undertaken previously. Since the ambitions of this report are not merely analytical, as it is also intended to fuel further policy debates, it includes some suggestions and recommendations to address the problems identified, including some cases of good practice (see chapter 5). However, before we turn to the results of our research, we take the remainder of this chapter 1 to describe in greater detail the study’s method, aim and limitations, but only after introducing the key subject matter of our research.

¹⁵ One day after the judgment of the ECJ in the Rüffert case.

1.2 THE POSTING OF WORKERS DIRECTIVE

Aims of the PWD

As already stated above, the PWD aims to reconcile the exercise and promotion of companies' fundamental freedom to provide cross-border services under Article 56 TFEU (old Article 49 EC), on the one hand, with the requirement to sustain a climate of fair competition and to take measures guaranteeing respect for the rights of workers temporarily posted abroad to provide the services, on the other. In order to do that it identifies at Community level which national mandatory rules of general interest in the host state must be applied to posted workers and establishes a hard core of clearly defined terms and conditions of work and employment for minimum protection of workers (laid down in article 3 (1) a - g) that must be complied with by the service provider in the host Member State. According to the Preamble of the PWD (Recital 7-11), the Directive thus makes the optional character of Article 7 Rome I Convention obligatory, by defining those subjects of employment law that must be seen as 'special mandatory'.

In this way, the Directive intends to provide a significant level of protection for workers, who may be vulnerable given their situation (temporary employment in a foreign country, difficulty in obtaining proper representation, lack of knowledge of local laws, institutions and language). The Directive also aims to play a key role in promoting the necessary climate of fair competition between all service providers (including those from other Member States) by guaranteeing a level playing field, as well as legal certainty for service providers, service recipients, and workers posted within the context of the provision of services.

Personal scope of the PWD

The Directive applies to undertakings which post workers in the framework of the provision of services to work temporarily in a Member State other than the State in which they habitually carry out their work and whose legislation governs the employment relationship (excluding merchant navy undertakings in regard to seagoing personnel, see article 1(2)). Pursuant to article 1(3) it covers three transnational posting situations, namely:

- ☐ posting under a contract concluded between the undertaking making the posting and the party for whom the services are intended,
 - ☐ posting to an establishment or an undertaking owned by the group,
 - ☐ posting by a temporary employment undertaking to a user undertaking operating in a Member State other than that of the undertaking making the posting,
- with the proviso, in all three situations, that there is an employment relationship between the undertaking making the posting and the posted worker.

Furthermore, the Directive stipulates that undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State (article 1(4)).¹⁶

Substantive scope of the PWD

The hard core of rules to be respected, which are laid down in article 3(1) of the Directive, include in particular the following:

- ☐ maximum work periods and minimum rest periods,
- ☐ minimum paid annual holidays,
- ☐ minimum rates of pay,
- ☐ the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings,
- ☐ health, safety and hygiene at work,
- ☐ protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people,
- ☐ equality of treatment between men and women and other provisions on non-discrimination.

These rules must be laid down either by law and/or by collective agreements or arbitration awards which have been declared universally acceptable¹⁷ in the case of activities in the building work sector (referred to in the annex), while Member States are left the choice of imposing such rules laid down by collective agreements in the case of activities other than building work (according to article 3(10), second indent). They may also, in compliance with the Treaty, impose the application of terms and conditions of employment on matters other than those referred to in the Directive in the case of public policy provisions (according to article 3(10), first indent).¹⁸

Information, control and jurisdiction clauses in the PWD

To ensure the practical effectiveness of the system as established, Article 4 of the Directive provides for cooperation on information between the Member States. Liaison offices and authorities are designated to monitor the terms and conditions of employment and to serve as correspondents and contact points for authorities in other Member States,

¹⁶ See also Recital 20 of the Directive which indicates that the Directive does not affect either the agreements concluded by the Community with third countries or the laws of Member States concerning the access to their territory of third-country providers of services. The Directive is also without prejudice to national laws relating to the entry, residence and access to employment of third-country workers.

¹⁷ See in this respect also article 3 (8) which provides for further possibilities in the absence of a system for declaring collective agreements universally applicable.

¹⁸ Article 3 (10). See for further details also the Communication of the Commission on the implementation of Directive 96/71/EC, COM (2003) 458 final, 25.7.2003.

for undertakings posting workers and for the posted workers themselves. Pursuant to article 4(3) of the Directive, each member state also takes the appropriate measures to make the information on the terms and conditions of employment referred to in article 3 generally available. Besides this it is stated in article 5 that the member states shall take appropriate measures in the event of failure to comply with the PWD. In particular, they have to ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under the PWD. The Directive also contains a jurisdiction clause, in Article 6, which states that judicial proceedings may be initiated in the Member State in whose territory the worker is or was posted.

Implementation of the PWD

As laid down in article 7, the PWD had to be implemented on 16 December 1999.

1.3 THE METHOD, LIMITATIONS AND AIMS OF THIS STUDY

Approach and methodology

As has already been mentioned, this comparative study was compiled on the basis of twelve national studies¹⁹ which examined questions and difficulties arising in the practical application of the posting of workers legislation, as well as in its enforcement in practice. In this respect the study investigates not only the role of Member State authorities (primarily labour inspectorates) in enforcing the directive adequately, but also the relevant activities of social partners. To this end, the national rapporteurs have conducted structured interviews as well as studied legislation and case law. The national rapporteurs were assisted in this process by a detailed questionnaire, composed by the lead researchers in close cooperation with the European Commission and the national rapporteurs.

Although a systematic review has been undertaken regarding the implementation, application and enforcement of the PWD in all the countries concerned, it should be noted here that the findings of some country studies are highlighted more often than others. There are two principal reasons for this uneven spread of attention. First, since the PWD addresses countries in their role as host state, countries which have predominantly a sending role have less experience with the application and enforcement of the Directive. Secondly, the extent to which a certain system stands apart from the others with regard to its method of implementation, the way it is applied and/or its monitoring and inspection tools, or with respect to the actors involved in its enforcement system, is an explanatory factor. Hence, we should emphasize that all the country studies have contributed to the comparative analysis in chapters 2, 3 and 4, including those which attract less attention because the implementation or practical impact of the PWD in their countries is less problematic or noteworthy.

Restriction to twelve countries

The choice of countries included in the study was informed by five arguments:

- 1) The overview should include countries with a high incidence of posting, both as a receiving and a sending state.
- 2) The overview should cover a variety of low and high wage countries.
- 3) The overview should cover a variety of social models.

¹⁹ National experts were, for Belgium, Filip van Overmeiren; Denmark, Lynn Roseberry; Estonia, Merle Muda; France, Barbara Palli; Germany, Monika Schlachter; Italy, Giovanni Orlandini; Luxembourg, Guy Castegnaro & Ariane Claverie; The Netherlands, Mijke Houwerzijl; Poland, Marek Pliszkiwicz; Rumania, Christina Maria Ana; Sweden, Kerstin Ahlberg; United Kingdom, Keith Ewing.

- 4) The overview should cover the countries which have experienced specific problems with regard to the posting of workers as such and/or the implementation of the Directive as evidenced by high profile cases.
- 5) The overview should cover relevant examples of best practices – e.g. in the area of comparability of working conditions and/or cooperation between relevant actors.

As a consequence, we selected five countries as having a significant presence of posted workers as receiving states. These countries are *Belgium, France, Germany, Luxembourg and the Netherlands*. All but the Netherlands²⁰ have also been involved in high profile court cases and conflicts with regard to the posting of workers. Moreover, extensive cooperation has arisen between these countries and some of their neighbours e.g. in the field of trade union representation and mutual recognition of rights based on collective agreements. These facts made it pertinent to include all five countries in the study as host countries. Germany, the Netherlands, Belgium and France also feature as sending states. To complete the overview we have added the *United Kingdom* as a representative of a specific social model which has recently encountered highly politicized implementation and enforcement problems in the Lindsey Oil Refinery case. *Denmark* and *Sweden* are selected as representatives of the Nordic model, both of which are strongly affected by the Laval case. *Italy* has been chosen as a representative of the Southern European states.

In recent times, the countries mentioned so far have mainly been involved as receiving countries in posting of workers issues. This is different for the new Member States, which mainly feature as sending states. In order to shed some light on the problems related to the PWD from the perspective of posted workers and undertakings from these predominantly sending states, we have included *Poland, Estonia and Romania* in our selection: Poland as the major sending state, predominantly to Western Europe. The posting of Polish workers underlies several of the more current cases. This is due in part by the transitional measures which were adopted by (some of) the old Member States on Poland's accession to the EU. Estonia is selected as a representative of the Baltic states, with a sending relationship with the Scandinavian countries (compare Laval). Romania was chosen as representative of one of the most recent accessions, still under a transitional regime, having a sending relationship with some Southern European Member States.

In summary, among the countries which provided input for this comparative study were five predominantly host countries (importers of services performed by posted workers), viz., the 'continental social-market economy countries' Italy (IT) and Luxembourg (LUX), the Nordic countries Denmark (DK) and Sweden (SE) and the Anglo-Saxon United Kingdom (UK). The 'continental social-market economy countries' Belgium (BE), Germany (DE), France (FR) and the Netherlands (NL) play an important role as both sending and receiving states. Three predominantly sending countries (exporters of services performed by posted workers) were also studied, to complete the picture: the Central and Eastern European countries Estonia (EE), Poland (PL) and Romania (RO).

²⁰ Until recently: see C-307-309/09, *Vicoplus et al.*, Conclusion Advocate General, 9 september 2010.

This selection allowed us to study different implementation systems and social models from the perspective of both the receiving and the sending states. Moreover, significant incidents would be covered as well as relevant practices, from both perspectives.

Restriction to two sectors of industry

Part of the study is related to law and legal protection. To a great degree this depends on legislation and other generally applicable rules. However, protection through collective labour agreements (hereinafter mostly referred to as CA's or CLA's), enforcement by and cooperation between social partners and practical application of the directive may be sector-specific. In the interviews with social partners and government authorities it was deemed necessary to focus on specific sectors. Although national rapporteurs were encouraged to add individual cases or best practices from another sector, they were advised to restrict the systematic research to a few specific sectors. A choice was made for the construction sector and posting by temporary work agencies, which was informed by several factors:

- 1) Specific characteristics of the sector in relation to posting
- 2) Relevance in practice
- 3) Full overview of modalities of posting

1 Specific characteristics of the sector in relation to posting

Posting in the construction sector is the archetypal cross-border posting, which lay at the origin of the PWD. The sector is characterized by the fact that the service is actually performed at a specific site, and hence requires workers to move to that site to perform the services. Not all services are performed in that fashion. Another sector which is characterized by the fact that the services are performed 'on site' is the service provided by temporary work agencies. Compared to construction, though, the temporary agency industry is atypical: on the one hand it is (now) recognized as an independent sector in regard to the social dialogue, while on the other hand the temporary agency workers are placed at the disposal of an employer in another sector, which could be anything from construction to banking and other commercial services, to agriculture and manufacturing. This means that workforce provision crosses the lines between different sectors of industry. The demarcation between the two modalities might not always be clear – see e.g. the preliminary question posed by the Dutch Council of State to the European Court of Justice with regard to demarcation between posting under mode a): contracting and subcontracting, and mode c): provision of workforce.²¹

2 Relevance in practice

The construction sector is still a potent source of social unrest as well as legal uncertainty: conflicts in this sector have led to numerous proceedings before the ECJ. The same argument holds for the temporary work agency sector. Again, several of the well-

²¹ Raad van State, 200801014/1. Datum uitspraak: 29 juli 2009. AFDELING BESTUURSRECHTSPRAAK, LJN: BJ4133.

known posting cases deal with the precarious position of these workers. The temporary work agency sector is also of special interest because of the possibility that special provisions may be applied to these workers and/or the practice in some member states, applying transitional measures regarding such workers' access to the labour market.

3 Full overview of modalities of posting

The Directive covers three modalities of posting which can be summarized as 'on site' services for a third party, intra-group postings within a group of undertakings and postings by temporary employment undertakings or placement agencies. Whereas construction and temporary work agencies cover the first and third modality, there is no typical sector that (also) covers the second option of lending out within a group. However, the second modality may be used in the construction sector.

Other sectors which seem to have experienced problems with regard to the protection of foreign workers, including the transport sector, hotel, restaurant and catering business, healthcare, agriculture and fisheries, are part of this study to the extent that they featured in prominent cases in the public press. In this respect, we focus on the (im-) possibility of determining whether workers in such media cases were actually posted within the meaning of the Directive, or rather were migrant workers. Besides this, the transport sector was included in order to establish whether the national implementation measures of the PWD are deemed applicable to it. Due to the specificity of the sector and the interference with other EU regulation in this area, transport is not studied in detail.

Aims and outline of the study

This study includes the following parts:

(1) Chapter 2 deals with the PWD in its legal context, set against differing private international law (PIL) and national collective labour law systems of the countries covered by this study. The aim is facilitative: we believe it is crucial for the understanding of the analysis in the next two chapters.

(2) Chapter 3 is concerned with existing problems in the *implementation* and *application* of the Directive in practice. The focus in this part of the research concerns articles 1 and 2 (the concept of posting and of posted worker) and article 3 (terms and conditions of employment of the posted worker) of the Directive. Since the social partners may be involved in both the implementation and the application of these articles of the Directive, relevant aspects of their involvement are also studied. The goal is to describe the practice in the Member States and to identify, explain and assess differences in the interpretation and application of the relevant provisions.

(2) Chapter 4 deals with existing problems in *enforcing* rights conferred under the Directive. The objective of this part of the research is to describe and assess existing problems, difficulties and obstacles encountered by posted workers intending to enforce their rights stemming from the Directive, as well as by monitoring authorities in the host

Member States when controlling the aspect of the working conditions under article 3 of the Directive and its enforcement in practice.

(3) Chapter 5 provides a summary of the findings in the foregoing parts of the study followed by specific recommendations. The goal of this final part of the research is to determine whether difficulties and problems in implementing, applying and enforcing the PWD are caused by:

- The national implementation method and/or the national application of the Directive
- The national system of enforcement
- The Directive as such and/or
- Transnational cooperation (or the lack thereof)
- Other reasons.

Consequently, suggestions are given on how to improve the legal and/or practical situation in that respect. Best practices are also established, with an assessment of whether they may possibly be helpful in addressing similar situations in other Member States. Please note that analysis and recommendations in this Chapter, represent the personal views of the authors and may not be regarded as the official position of the European Commission.

CHAPTER 2. The PWD, its legal context and comparison with different national legal traditions

2.1 INTRODUCTION

The huge differences in the implementation, application and enforcement of the PWD in the countries studied may to a great extent be explained by the different national legal traditions into which the Directive is transposed. This is not a unique finding with regard to the PWD; it plays a role in all situations where EU Directives are transposed into the national law of a Member State. Nevertheless, it should be noted that the PWD is an atypical Directive in the sense that it does not predominantly address one main legal discipline but rather stands at the crossroads between national (collective) labour law, internal market law and private international law (PIL). Thus, before we turn to the actual implementation, application and enforcement of the PWD itself in Chapters 3 and 4, we pay attention here to the PWD in its legal context and set it against different PIL and national collective labour law systems of the countries studied. It is our view that this preliminary exercise is crucial to an understanding of the scope of application and the practical impact and enforcement of the PWD, which are dealt with in the Chapters 3 and 4.

Member States of the EU have very divergent systems of labour law. The line between contractual labour law and statutory labour law might be drawn differently, leading to a different interpretation of the Rome I Regulation¹ in regard to labour law. There are also great differences between the Member States regarding the respective roles of the state, the social partners and the parties to the individual contract. These differences impact not only the way the Directive is transposed in the Member States, but – even more so – the practical protective effect of this transposition. The Directive does not harmonize the substantive provisions of national law with regard to the topics mentioned in Article 3. If, in a given country, there is no binding provision on a minimum wage in a certain sector of economy, the protection offered by Article 3 (1) (a) is moot. A country where wage levels for each job and level of seniority are laid down in generally applicable collective agreements is in a different position from one where all wages but the minimum are negotiated at plant level. These differences are discussed below in section 2.3, based on the national reports on the implementation of Article 3(8) PWD.²

The PWD is based on EU competences related to the internal market. However, the Directive contains rules on mandatory protection which can be understood to form an application of Article 7 of the Rome Convention and it contains a provision on jurisdiction which supplements the Brussels I Regulation. The PWD recognizes this

¹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L177/6, 4 July 2008.

² But they will also return in the analysis of the level of substantive protection reached by the PWD in section 3.6.

overlap by explicitly referring to private international law in its preamble.³ More implicitly, private international law plays a role in Article 3(1) which states that “Member States shall ensure that, *whatever the law applicable to the employment relationship* (emphasis added AH/MH), the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters...”. Thus, it is made clear that the law applying to the labour contract is regulated by private international law (currently the Rome I Regulation), but the PWD superimposes – if necessary – the minimum protection of the laws of the host state upon the protection already offered under the law applying to the contract by virtue of the Rome I Regulation.⁴ Several national PWD implementation measures clearly build on the connection between PIL and PWD. Below, in section 2.2, we pay attention to these national approaches regarding the PIL position of posted workers, but we start that section by giving an account of the relevant provisions of the Rome I Regulation.

³ See recitals 6-11 of the PWD, starting with the observation (6) that the transnationalization of the employment relationship raises problems with regard to the legislation applicable to the employment relationship and that it is in the interests of the parties to lay down the terms and conditions governing the employment relationship envisaged. Then (7-10) an introduction is given to the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, signed by 12 Member States and entered into force on 1 April 1991 in the majority of Member States. The general rule laid down in Article 3 and the specific rules for international employment contracts, laid down in Article 6 and 7 are described. Finally (11), a reference is made to the principle of precedence of Community law laid down in Article 20 of the said Convention, which means that it does not affect the application of provisions which, in relation to a particular matter, lay down choice-of-law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts.

⁴ Compare with regard to the relationship between the Rome I Regulation and the PWD: Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization Com(2002)654final p. 36.

2.2. PWD IN RELATION TO PIL AND NATIONAL PIL TRADITIONS

The Rome I Regulation

The law of the individual labour contract is defined by Article 8 of the Rome I Regulation⁵ (previously Article 6 of the Rome Convention). In the absence of a choice of law by the parties, Article 8 (2) submits the individual contract of employment to ‘the law of the country in which or, failing that, from which⁶ the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.’ Hence, in case of (genuine) postings of short duration, Article 8 of the Rome I Regulation subjects the individual contract of employment to the law of the habitual place of work (as Article 6 of the Rome Convention did before it). This will most likely be the country of origin of both worker and employer.⁷ If the place of work is undetermined or changes so frequently as not to allow the identification of a place where or from which the work is habitually performed under paragraph 3 of Article 8 ‘the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated’. In all cases another law may be applied ‘where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3’ (Article 8 sub 4). Hence Article 8 tries to establish which law has the closest connection to a specific individual contract of employment. In most cases this will be the law of the place where the work is performed. However, the place of work is not always decisive. The place of work can be incidental or temporary, or the contract may have a closer connection to another country under Paragraph 4 of Article 8. The employer’s country of origin is only a secondary factor in determining the applicable law: it may be relevant when there is no habitual place of work, or as one of the factors establishing a closer connection.

⁵ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) *OJ L 177*, 4.7.2008, p. 6–16.

⁶ The Rome I Regulation differs from the Rome Convention in its specific reference to the country *from* which the employee habitually carries out his work in the text of the provision. This phrase is added to adjust the conflict of laws rule to the interpretation given by the ECJ to the rule on jurisdiction in the Brussels I Regulation which (like Article 6 of the Rome Convention) merely refers to the habitual place of work. The ECJ interpreted this as to include the situation in which the employee habitually works in more than one country, but does so from an identifiable center of activities. Hence, the phrase refers to the base from which the worker operates and not to the country of establishment of the employer. See inter alia ECJ 9 January 1997, C-383/95 ECR p. I-57 (Rutten v. Cross Medical). See on the consistent interpretation of the three provisions (Rome Convention, Rome I Regulation and Brussels I Regulation) recently: ECJ 15 March 2011, C-29/10, Heiko Koelzsch v. Etat du Grand-Duché de Luxembourg.

⁷ This is not necessarily the case: neither the employee nor the employer has to be established in the country where the work is habitually performed. An example of the worker not living in the country where the work is performed is frontier work. An example of the employer not being established in the country of work would be the foreign correspondent working in country A for a newspaper or television station in country B. Compare also the case law on jurisdiction in individual employment disputes under the Brussels Convention and the Brussels I Regulation, especially C-125/92, Mulox IBC / Geels, ECJ 13 July 1993, ECR p. I-4075, C-383/95 Rutten / Cross Medical, ECJ 9 January 1997, ECR p. I-57 and C-37/00, Weber / Universal Ogden Services, ECJ 27 February 2002, ECR p. I-2013.

Accordingly, a first conclusion should be that under the Rome I Regulation the law of the employer's country of origin only applies to the individual contract of employment of workers effectively working in another country when

- the said workers habitually work in or from⁸ their employer's country of origin and are only temporarily posted to the host country;
- there is no country in which or from which the workers habitually work, making the employer's place of business the most relevant connection;
- the employer's country of origin is for other reasons the one most closely connected to the contract. These other reasons could embrace the worker's origin, the place of recruitment, special travel arrangements and allowances to compensate the worker for working abroad etc.

Article 8 lays down a stepped rule for determining the law that applies to the contract as such. The outcome of the process depends on the circumstances of the individual case and the way these circumstances are weighted within the national traditions. The PWD diverges from this rule by prescribing that Member States shall ensure that undertakings established in other Member States, which post workers to their territory, guarantee these workers a core of minimum protection at the level prevailing in the host Member States. In doing so, the PWD can be understood to offer 'overriding mandatory protection' as regulated in Article 9 of the Rome I Regulation.⁹ Hence, the impact of the PWD in the various Member States also depends on the use these Member States already made of Article 9 of the Rome I Regulation (and its predecessor Article 7 of the Rome Convention).

Different PIL traditions in the Member States

Germany and the Netherlands, for example, have a (more or less) clear distinction between public law rules on labour protection (e.g. in the area of safety and health) and the private law rules on the labour contract. Both countries spread the regulation of the labour relationship over several statutes. The (basic) contractual aspects are regulated in the civil code whereas labour protection rules, on safety and health, on working time, on protection of pregnant women etc., are contained in separate statutes. If a labour contract is governed by foreign law, German/Dutch mandatory provisions will only apply to the contract if these provisions can be CLA'ssified as overriding mandatory provisions in the sense of Article 9 of the Rome I Regulation. Most (statutory) labour protection rules will have this character, most contractual rules will not. Of the latter category, only specific

⁸ It is currently unclear whether the posting provision in Article 8 of the Rome I regulation can also be applied to workers who habitually work *from* a specific country rather than *in* a specific country. The text of the provision suggests it can not.

⁹ Strictly speaking, host country *protection* is guaranteed by the PWD. This does not necessarily entail the application of host country *rules*. The difference can be illustrated by the Danish implementation regarding holiday and holiday pay, described by Martin Gräs Lind in "The Danish law on the posting of workers" Formula Working paper no. 24, 2010 p. 7. Lind indicates that application of the Danish rules would create problems. Hence, the Danish law is not made applicable as such, but the worker is guaranteed the level of protection of the Danish law as regards holiday and holiday pay. If necessary, the rights of the worker under the law applying to the contract should be supplemented to ensure the Danish level of protection.

rules will be overriding mandatory provisions because they are deemed to protect a public or supra-individual interest. Article 3 of the posting directive is seen as a specific interpretation of Article 9 of the Rome I Regulation which to a certain extent alters the traditional approach in those countries by extending the national concept of overriding mandatory provision. Interestingly, the Dutch implementation law only deals with this extension. Acts and provisions that were already deemed applicable under the traditional conflict of laws approach, such as the safety and health act and the working time act, were not mentioned in the implementing statute.¹⁰

France, Luxembourg and Belgium represent the ‘ordre public’ tradition in which labour law provisions are to a great extent subject to criminal sanctions. This is true of both the rules which in the German tradition would be deemed to establish labour protection (Arbeitschutz) and those which are more contractual in nature. In France and Luxembourg the distinction between the two types of provisions distinguished in the Dutch and German system is further obscured by the fact that both types of provisions are contained in a single Labour Code. Criminal law traditionally applies on a strictly territorial basis. Hence, the national provisions are deemed applicable to all employment within the territory. Because of the criminal sanctions attached to most mandatory rules of labour law, these rules are perceived as being part of public policy. The law applying to the individual contract of employment is irrelevant to the applicability of these public policy provisions.

The situation in Poland is to some extent the reverse of that in the countries of the ordre public social. Until 2008, when the Rome Convention was ratified and entered into force in Poland, the posting abroad of Polish workers occurred under government supervision, through a Polish intermediary. During their work abroad, these posted Polish citizens retained the protection of Polish law. Swiatkowski formulated this in his working paper for the Formula project as ‘the absolute exclusivity of Polish labour law concerning employment relationships between Polish employees and Polish employers regardless of whether work is performed in Poland or abroad’. Accordingly, in private international law the common origin of employer and worker assumed predominance as a relevant connecting factor, over that of the place of work. The concept of equal protection was deemed to apply to all Polish workers, regardless of the place of (temporary) engagement.¹¹ This principle could be derogated from only by international agreement. The protection of the national labour market against social dumping was regulated through public law requirements for foreign companies wanting to open up establishments in Poland and through the requirements attached to work permits for foreign workers.

The Danish and Swedish systems do not lay much weight on the law applying to the individual contract either, albeit for a totally different reason. In these systems there is a

¹⁰ Staatsblad 1999, 554. They were, however, referred to in the explanatory memorandum (parliamentary documents K II 1998/1999, 26 524 nr. 3, p. 2-3).

¹¹ Andrzej Świątkowski, Polish response to the European development, Working paper no 18, 2010. <http://www.jus.uio.no/ifp/english/research/projects/freemov/publications/papers/2010/september/index.html>

quite strict division between the individual contractual relation covered in international cases by the Rome I Regulation (and in the case of Denmark: the Rome Convention) in combination with the PWD on the one hand, and the system of collective labour law which operates independently of Rome I on the other. This point of view is closely related to the autonomous position of collective labour relations in these systems. The PWD was only deemed to be relevant with regard to the statutory protection of the individual worker. The collective labour relations (including the guarantees contained in collective agreements regarding working conditions) were, prior to the Laval judgment, treated as a separate issue which is not subject to the choice of law rules for the labour contract.

Finally, the UK presents yet another, different choice of law. Here, a strict distinction is made between common law – to which the choice of law rules of Rome I apply¹² – and special statutory protection, the application of which to international contracts may be determined by special scope rules. For example: until 1999 the Employment Relations Act applied to anyone who ordinarily worked in Great Britain. This scope excluded the application of the Act to workers posted to the UK temporarily. This territorial restriction was removed in 1999. Since then the Act has applied both to employees who ordinarily work in Britain and to posted workers during their employment within the territory. A similar change occurred in other statutes, such as those on non-discrimination, working time and minimum wage.¹³ As a result, the multilateral choice of law rule of Article 8 has no significance for the actual day-to-day protection of workers under the different statutes. Moreover, as in the Scandinavian countries, the system of collective labour relations operates largely outside the legislative framework for the individual contract of employment. The application of collective agreements is not based on a statutory duty, but rather on effective pressure exerted by the trade unions in a specific sector of industry (collective agreements are CLA'ssified as 'gentlemen's agreements').

Double burden or prevention of lacunae?

As mentioned above, labour protection is often organized through statutes having an independent scope of application in international cases. The PWD is built on the presumption that during the posting the worker will be protected by the labour law provisions of the country in which he normally works (see Article 2(1)). However, not all national laws of the home state will apply to workers performing work outside the territory. The Polish law used to be applicable as soon as both worker and employer were Polish, but UK statutes will only apply to work outside the UK if the work is ordinarily performed within (or at least not ordinarily performed outside) the UK. Hence a Polish worker who is contracted by a UK firm in order to be posted to Germany, might not be covered by the UK statutory protection. Something similar applies with regard to the Dutch minimum wage act. This act only applies to work outside the Netherlands when

¹² The UK has opted in on the Rome I Regulation: see Commission Decision 22 December 2008 (2009/26/EC) OJ 2009, L 10/22,.

¹³ Tonia Novitz, UK implementation of the posted workers directive 96/71, Formula Working paper no 22 (2010) p. 6-7.

both worker and employer are domiciled or established in the Netherlands. The Dutch safety and health regulation act has only a very limited extraterritorial application, whereas the Romanian safety rules that are specific to the workplace only apply to workplaces in Romania. A specific analysis would have to be conducted of each type of protection and each combination of countries to check whether the application of the protection of the host state would actually lead to a double burden or rather prevent a legal lacuna. This is most evident with respect to the health and safety provisions, which are closely linked to the actual place of work lying within the territory (compare Romania, the Netherlands). But other protective statutes, too, may not apply to posted workers. This holds especially for 'posted' workers who do not have a regular place of work (nor in some instances a domicile) in the country of establishment of the service provider. We place 'posted' between brackets here because, in light of the definition of a posted worker laid down in Article 2(1) PWD, it may be contested whether a worker can be classified as a posted worker if he doesn't have a place where he 'normally works'.

In other words: The place of establishment of the service provider in its home country may not be sufficient to ensure effective protection of its workers under the law of the home state. The latter law may require a sufficient link between the worker, the contract of employment and the home state, if its protection is to apply.

Reconciling PIL with the PWD?

PIL rules are geared to the individual case. Article 8 Rome I Regulation tries to identify which law is most closely connected to the individual contract of employment, taking into account the circumstances of the case.¹⁴ The *actual* place of work plays an important role in this determination, but is not always decisive. In particular, in case of short-term postings the contract will remain subject to the law of the *habitual* place of work. This rule ensures a certain measure of continuity with regard to the law applicable to the individual contract. This was deemed to outweigh the interest of subjecting all workers employed within the territory of a specific state fully and exclusively to the law of that state. The habitual place of work may often coincide with the country of origin of the employer, but in legal terms these are distinct connecting factors.

The PWD does not purport to change the choice of law rule for individual contracts of employment. It merely lays down a number of mandatory rules to be observed during the period of posting in the host Member State, "*whatever the law applicable to the employment relationship*".¹⁵ Accordingly, the PWD can be considered to be an interpretation of Article 9 of the Rome I Regulation (previously Article 7 of the Rome Convention) which deals with the application of overriding mandatory provisions.¹⁶ Not all labour law provisions constitute overriding mandatory provisions (see the previous subsection on different PIL tradition).

¹⁴ Green Paper Rome I Com(2002)654, 35 ff.

¹⁵ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the implementation of Directive 96/71/EC in the Member States, COM(2003) 458 final, p. 6

¹⁶ Compare Com(2003)_458 and the French Circulaire DGT n° 2008/17, 5th October 2008, p. 3.

Interestingly, the EU case law on posting workers also refers to the distinction between the law applying to the labour relationship as such and the law of the host state, which applies only to a limited extent. However, the case law seems to be based on the assumption that the law applying to the labour contract of the posted worker is that of the home state of the service provider. In the Laval judgment, for example, the ECJ states in paragraph 75 that the PWD “thus prevents a situation arising in which, *by applying to their workers the terms and conditions of employment in force in the Member State of origin* (emphasis added) as regards those matters, undertakings established in other Member States would compete unfairly against undertakings of the host Member State in the framework of the transnational provision of services, if the level of social protection in the host Member State is higher.” In paragraph 81 the ECJ concludes that “without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a commitment made to their own posted staff, the terms of which might be more favourable – the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, unless, *pursuant to the law or collective agreements in the Member State of origin* (emphasis added), those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision.”

The absence of any reference to PIL in the case law of the E(U)CJ so far may be explained by several factors: Firstly, it is important to note that, until recently, the Court did not have any competence to interpret the Rome Convention, whereas the Rome I Regulation only entered into force on 17 December 2009 (for contracts concluded after that date). As a result, the EU choice of law provisions for labour contracts have only been put before the ECJ twice, only one case being decided at this date.¹⁷ Secondly, the preliminary questions in the cases concerning posting of workers that were put before the ECJ have so far not touched upon the definition of a posted worker in Article 2(1) of the PWD.

Application of host country rules to posted workers may hamper the free movement of the employer’s services, especially when the worker is already protected by the law of the country from which he is posted. However, it is important to realize that the application of the law of the latter country is based on the Rome Convention and Rome I Regulation and in principle not on the rules governing the internal market – though the exact interaction between the two systems is as yet unclear. The country of origin principle as laid down in the Services Directive is not decisive for the law applying to the labour contracts of posted workers.¹⁸

¹⁷ Recently the ECJ gave judgment on the interpretation of Article 6 of the Rome Convention on individual contracts of employment (15 March 2011, C-29/10 (Koelzsch v. Luxembourg). Another preliminary question on Article 6 is still pending: C-384/10 Voogsgeerd. Neither case pertains to the concept of posting in Article 6 of the Convention.

¹⁸ See Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market *OJ L 376*, 27.12.2006, p. 36–68 14, preamble paragraphs 82, 86-87.

The choice of law rule in the Rome I Regulation primarily refers to the country in which the worker habitually performs his work. It is perfectly possible for a service provider to be established in country A without this being the country in which the workers who perform the service habitually work.¹⁹ The employer may dispatch workers more or less permanently to one of the other Member States. In that case, it may turn out, depending on the circumstances of the specific case, that the worker is habitually working in the country of ‘posting’ (country B). If that is the case, the law of country B (rather than the law of country A) should therefore apply (in full) unless country A has a closer connection to the individual labour contract. An important factor in this decision will be whether the costs of expatriation are borne by the employer or rather by the worker. If the worker carries the risks and expenses of moving abroad (and, as the case may be, back to his home country), there is less reason to consider the contract as more closely connected to country A (the country where the employer is established). Hence the non-reimbursement of costs is an important indication of a closer connection to the country where the work is actually performed.²⁰ In that case, there is no reason to limit the protection of the host country to the areas mentioned in Article 3(1) of the PWD.

The situation is further complicated by the fact that protection of workers is only to a minor extent based on the individual contract. Both public law regulations and collective labour relations play an important role here.²¹ None of the systems scrutinized in this report lays much weight (nor can they) on the circumstances of each individual contract of employment. They all use more general connecting factors, which are relevant to the entire work force of a specific employer or a particular site. This creates an inevitable tension between the individual rules of the Rome I Regulation and the more general rules applied by social partners and labour authorities when implementing and enforcing labour standards. Although this tension cannot be resolved by the PWD, the criteria that are used to monitor compliance with the PWD should, as far as possible, (also) take private international law considerations into account. This means that as a rule the application of the law of the host state should only be limited by the PWD when there is a real and relevant link between the individual contract of employment of the ‘posted’ worker and the sending state, warranting the application of the sending state’s law as the law of the closest connection. .

¹⁹ Compare C-29/10 referred to above.

²⁰ Compare to Art. 3(7) second sentence: Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.

²¹ Older private international law studies e.g. Gamillscheg 1959, frequently advocated that the internationally mobile worker did not need special protection, given his special status. However, in the internal market cross-border mobility is not restricted to higher employees and/or specific migrant professions such as circus artists.

2.3 PWD AND NATIONAL SYSTEMS OF COLLECTIVE LABOUR LAW (Article 3(8))

Countries with a functioning erga omnes system

As described above, different Member States have different traditions regarding the role of overriding mandatory provisions/ordre public in the area of labour law. This impacts their interpretation of Article 7 of the Rome Convention / Article 9 of the Rome Regulation. But there is also a marked distinction in the role of collective labour agreements in transnational cases. Whereas in both the German/Dutch tradition and the French/Belgian/Luxembourg tradition, collective agreements are regarded as a source of law for the individual labour contract, this is not necessarily the case in the UK, Denmark and Sweden.

In France, Luxembourg and Belgium, even provisions of collective agreements (made generally binding) can be enforced through criminal proceedings. For private international law purposes these CLA's are part of public policy (ordre public social).

Within the Dutch and German systems, the generally applicable CLA's are regarded as a possible source of law for the individual labour contract. Their application in transnational cases is related to that law-like character: provisions in generally binding CLA's could be part of the law applying to the individual contract, or rather apply independently of it, as overriding mandatory provisions. Germany differs from the Netherlands (and Belgium, France and Luxembourg for that matter) in its tradition with regard to the extension of collective agreements. Outside the construction sector, the procedure of extension only operates as a fallback mechanism to compensate a low level of organization within a specific sector. It is rarely used. Moreover, Germany did not have a tradition of including wage provisions in the (parts of) collective agreements that are declared to be generally binding. A special procedure was created to establish a minimum wage in the construction sector.²² The other wage provisions in national collective agreements, as well as regional collective agreements, are not extended, but may still be generally applied. As such they served as a reference for the social clauses in public procurement (prior to the Rüffert judgment of the ECJ on 2 April 2008).

Countries without a functioning erga omnes system

The identification of CLA's as a source of labour law for the purposes of private international law is less prominent in countries which, for legal or practical reasons, do not declare collective labour agreements to be generally binding. The relevant systems

²² Which was extended to industrial cleaning and mail services in 2007 and to nursing care, private security business, coal mining operations, laundry services for property client services, waste management, apprenticeship and retraining in 2009: Monika Schlachter, The Posting of Workers Directive – German reactions and perceptions, Formula Working paper no 20, 2010, p. 42 and 46.

may have different rationales for the absence of such extension procedures. First, extension only occurs when a collective agreement is reached at sector or national level. Company agreements are not extended. In the UK and Estonia, the company agreement is the predominant type of CLA.²³

But even when sectoral agreements are concluded, they cannot always be extended. Italy recognizes the possibility of extension in its constitution, but has never adopted the necessary implementing statute. Hence there is no way to extend collective agreements formally. However, clauses in sectoral collective agreements which establish a minimum wage have a de facto ergo omnes effect, as courts take these provisions as a basis for calculating the constitutionally guaranteed ‘decent wage’.

Sweden and Denmark do not have an extension procedure in which the state is involved in giving effect to collective agreements. They staunchly adhere to their autonomous system in which collective labour agreements operate primarily on the collective level and primarily create obligations at that level.²⁴ In these two Nordic countries the application and enforcement of collective agreements is a matter of collective labour relations and not a matter of private international law – which is deemed to relate only to the individual labour contract.

In the UK it is assumed that collective agreements are not legally binding. Sector agreements are rare. However, especially in the construction sector, there is a well-developed system of sectoral agreements, which are generally applied. Their application is ensured by union pressure (prior to Laval) or through a contractual clause in the service contract (of procurement or subcontracting).

The situation in Poland, Estonia and Romania reflects the weak position of the unions in these states. Sector agreements are rare. Extension, though possible, is even rarer or else altogether absent. Poland has a limited extension system but this has never been used as yet. Estonia has extended CLA’s on the minimum hourly wage of health care professionals and on working conditions of transport and road workers. Romania has a system of automatic extension of collective agreements. This means that agreements concluded at sectoral level automatically apply to all workers in the sector. National agreements apply to all workers in all companies. There is a national agreement on relative wages (providing wage scales for different levels of occupation related to the national minimum wage). But CLA’s are predominantly entered into at the company level.

²³ Overall, Estonia does not have a strong tradition of collective bargaining.

²⁴ In Denmark direct enforcement of CLA’s is the prerogative of the social partners: the CA cannot be invoked directly by individual workers. In Sweden workers who are members of the union that concluded the agreement may invoke the CA under their individual agreement. Disputes about the interpretation of the CLA are the prerogative of the social partners, however.

The PWD and the different systems of standard setting

The PWD was supposed to cater for these differences in character of the collective labour law systems. But it seems to be more apt at accommodating the systems in which collective agreements are comparable to delegated legislation, such as the French/Belgium/Luxembourg/German/Dutch systems of generally applicable CLA's.²⁵ This is caused in part by the legislative bias of choice of law itself, which primarily deals with conflicts of *laws*. But the problem has been aggravated by the case law of the ECJ, which seems to treat the social partners as quasi-legislators for the purpose of restrictions but not for the purpose of justifications.

Under Article 3 (1), host states shall ensure posted workers the terms and conditions of employment covering the matters mentioned there which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or
- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8.

Article 3(8) specifically allows the Member States to refer to non-extended collective agreements, under the conditions mentioned therein. This provision was included in the Directive *inter alia* to allay Denmark's fears that the directive would not be able to accommodate their autonomous system of standard setting.²⁶ However, since the ECJ judgments in what is sometimes called the 'Laval quartet', several mechanisms which were (and still are) used in the Member States to create minimum levels of protection, might be seen as being in conflict with the Directive in combination with the Treaty provisions on free movement of services. This is caused in part by the wording of Article 3(8) and partly by the interpretation of the Directive and Treaty by the ECJ.

When the requirements of Article 3(8) in combination with the case law of the ECJ are compared to practice in the Member States, certain discrepancies are revealed.

- The provision seems to permit recourse to non-extended collective agreements only in case a Member State does not have a system for declaring collective agreements to be generally binding. If a system exists but is not (often) used in practice, recourse to agreements entered into by the most representative organizations and/or agreements that are generally applied might be problematic. For Germany this tension has become evident in the ECJ judgment in the Rüffert case,²⁷ but the position of Italy may also be problematic.
- The collective agreements entered into by the most representative organizations must have national coverage, excluding the referral to generally applied regional and/or local agreements. However, CLA's with a more limited, local reach may

²⁵ See also Swiatkowski, Polish response to the European development, Formula Working paper no 18, 2010, p. 34 and 42.

²⁶ Compare Kerstin Ahlberg, The Age of innocence – and beyond, Formula Working paper no. 21, 2010 p. 6

²⁷ Rüffert para 27 "Third, regarding the second subparagraph of Article 3(8) of Directive 96/71, it is clear from the actual wording of that provision that it is applicable only where there is no system for declaring collective agreements to be of universal application, which is not the case in the Federal Republic of Germany."

- be used when these are generally applicable. Depending on the exact interpretation of these terms, this restriction may affect inter alia the systems in Germany and Denmark.
- The ECJ lays great weight on transparency, which entails that the employer should be able to discover in advance what his obligations are with respect to collective agreements (probably even before tendering for the contract). This rules out bargaining at company level, as is/was usual with regard to wages in Denmark and Sweden. It should be noted that this requirement, together with the required national scope of the CLA's, runs counter to the need for flexibility, which is professed by the EU in its social policy (flexicurity principles).
 - The ECJ seems to demand that the Member States explicitly base themselves on Article 3(8). It is not entirely clear what this requirement entails, but it does induce government involvement in the process of collective bargaining to an extent that was hitherto not usual in Denmark, Sweden and the UK. It makes unions dependent on politics for the exercise of the right of action against foreign service providers. The inaction at the political level in the UK and the consequences thereof on the position of the unions demonstrates this reliance.²⁸

Of the Member States studied here, only Italy made explicit use of the possibility offered by Article 3(8) in its original implementing statute. Recently, Sweden and Denmark have followed suit.²⁹ Article 3.1 of the Italian implementation statute provides that the conditions applied to posted workers are the same as those included in '*collective agreement signed by the trade unions and employers' associations which are comparatively more representative at national level*', and applicable to '*national*' workers that carry out '*similar*' work in the same place. Through this provision the Italian law allows for the application to posted workers of local CLA's that are widely applied, but not generally binding. It is debatable whether this provision actually passes the non-discrimination test.

The Laval and Rüffert cases extended the effect of the PWD beyond the methods of standard setting covered by Article 3(8). This calls into question the legitimacy of several practices which exist in the Member States. In Sweden, respect for CLA's is induced indirectly by the codetermination act (MBL). A provision in this Act confers on the trade union a right to negotiate and possibly to veto the engagement of a certain (sub-) contractor (see in this regard also section 4.4). A simplified procedure was created for this, but it only applies if the (sub-) contractor is bound by a (Swedish) collective agreement. As a consequence, the procuring company/main contractor will encourage all subcontractors to join the employers' organization or to sign an accession agreement.³⁰

²⁸ Novitz, Formula Working paper UK; Ewing, national report UK to this study.

²⁹ However, these countries still rely on the autonomy of the social partners to establish and enforce employment conditions. Their adjustments to the Laval judgment differ, due to a different legal and political assessment of the ECJ judgment and of what is still possible under Article 3(8) of the PWD. See Jonas Malmberg, Posting Post Laval. International and National Responses, Working paper 2010:5, Uppsala Center for Labor Studies.

³⁰ Ahlberg, Formula paper, Sweden p. 14-15/Swedish national report

In the UK and Italy, the obligation to ensure compliance with the collective agreement by subcontractors can be part of the collective agreement itself. This mechanism is used specifically in the construction sector.³¹ In the UK sectoral collective agreements of general application exist mainly in the construction and engineering sectors. After the Lindsey Oil dispute the national agreement for the engineering construction industry (NAECI) was amended to provide a framework for regulating and auditing construction projects executed by non-UK contractors.³² The managing or major contractor is obliged to ensure that any non-UK contractor appointed will be in full compliance with the NAECI terms and the employers' organization membership conditions. These consist inter alia of the full implementation of workers' rights as guaranteed by the NAECI, advance notice of the contract to the unions and equal hiring opportunities for UK workers.

In the building sector in Italy the obligation to respect the collective agreement can be a consequence of the provisions of the CCNL – the national collective agreement for the construction sector. The contracting party (and the contractor) is/are expected to impose on their subcontractors that they shall respect the sectoral and local collective agreement, obviously in case of subcontracting in respect of building activities.

The ECJ has consistently held - in the context of the interpretation of Article 3(7) PWD - that employers may voluntarily agree to provide their workers with better protection than that offered by the PWD.³³ In the cases of the NAECI in the UK and the CCNL in Italy, the basic commitment to abide by the collective agreement is entered into by the main contractor or even the service recipient/contracting party. This commitment may be assessed as voluntary. It is currently unclear, however, how the ECJ would evaluate the position of the subcontractors in possible proceedings.

In summary, difficulties have been reported in several countries in their attempts to reconcile the PWD and internal market case law with their system of establishing labour standards. The "erga omnes" approach as well as the conditions laid down in Article 3(8) have given rise to difficulties not only in Sweden and Denmark, with their tradition of autonomous standard setting (often at company level, see section 2.2), but also in Germany and Italy and even in the UK (in sectors such as the construction industry, where relatively strong trade unions still exist). These problems became evident in the Laval and Rüffert cases. The problems are particularly severe when there is no domestic

³¹ For Italy: Art.14 of the Collective Agreement Construction Industry Sector.

³² National Joint Council for the Engineering Construction Industry; NAECI 2010-2012 <http://www.njceci.co.uk/> > national agreement. The special rules with regard to non-UK contractors is contained in appendix G to the CLA.

³³ Rüffert para 34 reads: "Therefore – without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a *commitment made to their own posted staff (emphasis added)*, the terms of which might be more favourable – the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g), of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision (*Laval un Partneri*, paragraph 81).

minimum wage regulation – making it perfectly legal to pay posted workers less than the prevailing local wages.³⁴

³⁴ The Danish expert, for instance, reports a growing problem with regard to the non-coverage of posted workers under collective agreements.

CHAPTER 3. PWD implementation and application: detailed review

3.1 INTRODUCTION

This chapter deals with existing problems in the *implementation* and *application* of the Directive in practice. The focus here is on Articles 1 and 2 of the PWD, regarding the concept of posting and of posted worker (see section 3.2), and Article 3, regarding the posted worker's terms and conditions of employment (see sections 3.6 and 3.7). Since the social partners may be involved in both the implementation and the application of these articles of the Directive, relevant aspects of their involvement are also examined.

The concept of posting as it is implemented in the Member States is studied in detail in section 3.2. As the legality of different types of posting may differ between Member States, separate attention is paid to the limits and restrictions that domestic law may impose on posting in section 3.3.

The transitional regime implemented upon the accession of the new Member States in 2004 and 2007 is studied in section 3.4. Section 3.5 presents an overview of cases. These sections serve as an illustration as to the problems that arise in practice, in regard to both the concept of posting and the legal position of the posted worker.

Sections 3.6 and 3.7 are dedicated to the different aspects of the protection of posted workers. Section 3.6 focuses on pay and working time arrangements, whereas section 3.7 covers the other aspects of the protection mentioned in Article 3 PWD.

3.2 ISSUES RELATED TO THE CONCEPT OF POSTING IN THE PWD

Preliminary remarks

The PWD contains both a definition of posting (Article 1, paragraphs 1 and 3) and a definition of posted worker (Article 2). The two concepts should be combined to determine the scope of directive's application. The elements of the definition are

- Undertaking established in a Member State, posting to another Member State.
- A transnational provision of services.
- The posting is undertaken in the framework of the said provision of services.
- The posting can be subsumed under one of the posting types mentioned in 1 sub 3:

(a) posting of workers to the territory of a Member State on the account and under the direction of the undertaking making the posting, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting;

(b) posting of workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting;

(c) being a temporary employment undertaking or placement agency, the hiring out of a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

- The worker is posted for a limited period of time
- To a Member State other than the one in which he normally works.

The Directive creates an obligation on the Member States to ensure that, whatever the law applicable to the employment relationship, the posting undertakings guarantee the workers posted to their territory the terms and conditions of employment included in the local laws and generally applicable collective agreements with regard to specific areas of protection.¹ If a worker is not covered by the Directive, no such obligation exists.² Hence the Member State could choose to offer not protection at all to a worker present in its territory. The Member State in which a conference is held may not feel obligated to apply its labour standards to the scientists visiting the conference. Likewise, an incidental visit to a client in a specific country may not trigger the application of local law to the travelling salesman's contract of employment. If the law of the host state is not deemed to apply because the worker does not fulfill the criteria for being a posted worker, we call this the lower limit of the concept. To avoid possible misunderstandings, it should be emphasized here that the term 'lower' does not express any value judgment but refers

¹ Simplified description of the content of Article 3.

² Apart from duties arising under the free movement of workers and non-discrimination requirements.

purely to the degree to which the worker is integrated in the host state and the contract's level of impact on the host state and vice versa.

Based on the case law of the ECJ in inter alia the case of *Commission v. Luxembourg* (C-319/06), the PWD leaves only limited room to extend the protection of posted workers beyond the hard nucleus mentioned in the Directive. Hence, whereas migrant workers are entitled to equal treatment, posted workers only receive the protection which is allowed under Directive.³ It can be argued that the definitions of posting and posted worker in the Directive also contain criteria for making the distinction between a posted worker and a worker entitled to full application of the law of the host state. This borderline between full integration and partial protection is what we call the 'upper' limit of the concept of posting. Thus, under the interpretation offered here, the Directive lays down a middle regime between the absence of any duty of the Member States to apply local standards (lower limit) and the right of the worker to full application of local standards (upper limit).

In this part of the study we are interested in identifying problems experienced by the Member States with regard to the criteria used in the Directive, their implementation and application. Thus, we have first tried to identify whether the Member States in their implementation actually distinguish between three categories of internationally mobile workers, namely (1) the foreign worker 'incidentally abroad'⁴ who is not protected by the directive and may only be covered by home state law, (2) the posted worker with limited double protection, and (3) the worker who is fully covered by host state law.

The Member States' implementation measures that we have studied roughly define the scope of their application in two ways: (A) they either more or less literally transpose Articles 1 and 2 of the Directive, or (B) they apply to all temporary work performed within the territory.

(A) Narrow, literal and/or explicit implementation of Article 1 and Article 2

Estonia has implemented the PWD through the so-called ELLTS.⁵ The scope of application of this law closely follows that of the PWD. It contains a definition of posted worker⁶ as well as a description of the three types of posting covered. Poland implemented the PWD through the Act of 14 November 2003.⁷ This 2003 Act introduced

³ However, if the Conclusion of AG Bot in the cases C-307-309/09 (*Vico plus*) were to be followed by the ECJ, an intermediate category may come into being, because posted agency workers would then qualify as both a posted and a migrant worker.

⁴ For other reasons than providing cross-border services to a recipient in another Member State.

⁵ Working Conditions of Workers Posted in Estonian Act (ELLTS) of 17 March 2004 – RT I 2004, 19, 135; 2009, 5, 35 in force as of 1 May 2004. <http://www.sm.ee>.

⁶ Posted worker is defined in ELLTS section 3(1) as a natural person who usually works in a foreign country on the basis of an employment contract and whom the employer posted to work in Estonia for a certain period in the framework of the provision of services.

⁷ Journal of Laws of 15 December 2003, 2003.213.2081.

a special chapter on posted workers in the Labour code which transposes more or less verbatim parts of the PWD into national law. This transposition includes Article 1. However, a definition of ‘posted worker’ is absent. In Romania, the PWD was transposed by Law no. 344 of July 19th, 2006, concerning the posting of workers within the framework of transnational service provision.⁸ This law contains an almost verbatim transposition of the compulsory parts of the Directive and hence, the definition of posted worker and posting closely follow the directive. Denmark implemented the PWD with the Posted Workers Act of 21 July 2006.⁹ This act regulates the application of Danish statutory protection to posted workers. The PWA (again) closely follows the structure and most of the text of PWD. Italy implemented Directive 96/71/CE by Legislative Decree (D.Lgs.) 25 February 2000, n.72.¹⁰ This decree, again, more or less copies the PWD’s scope of application. As we discuss below, however, it does contain a specification of the temporary element of the posting. In Luxembourg, the original implementation measure of 2002 transposed Articles 1 and 3 of the PWD almost literally into the Luxembourg Labour Code (Articles L 141-1 ff). Besides this, the 2010 amendments which were introduced in response to the case of the Commission against Luxembourg C-319/06 specify the criteria used in the Directive and the implementation law.

The Directive is implemented in Sweden through the Posting of Workers Act which came into force on 16 December 1999.¹¹ As regards the scope of application of the Act, the text is almost a carbon copy of the text in the Directive, except that it applies to employers established in any state other than Sweden, not only to employers from other Member states.

In France the implementation measures contain a definition of both posting and posted workers. This seems to bring France into the first category above. However, the implementation seems to change the scope of application as compared to the Directive, beyond mere interpretation and specification. The PWD has been implemented by two Statutes, a Decree and a Circular.¹² Article L.1261-3 C.trav. defines “posted workers” as individuals normally working for an employer regularly established abroad, temporarily providing work on behalf of that employer in France. According to Article L.1262-1 “posting of workers” can occur in the following circumstances:

⁸ Official Journal 636 of 24 July 2006.

⁹ Lovbekendtgørelse (Consolidation Act) nr. 849 of 21 July 2006. It has been amended three times since then: Acts amending the posted workers act (*Lov om ændring af lov om udstationering af lønmodtagere*), nr. 263 of 23 April 2008; nr. 1394 of 27 December 2008; nr. 509 of 19 May 2010. The second amendment was adopted on 27 December 2008 in response to the *Laval* judgment.

¹⁰ Attuazione della direttiva 96/71/Ce in materia di distacco dei lavoratori nell'ambito di una prestazione di servizi” published in Gazzetta Ufficiale (G.U.) 30 March 2000, n.75 which entered into force 15 days after its official publication.

¹¹ Lag om utstationering av arbetstagare, SFS 1999:678. The Act was last amended in 2010 through act SFS 2010:228, which was adopted in reaction to the ECJ’s ruling in *Laval*. The revised legislation came into force on 15 April 2010.

¹² Statute n° 93-1313, 20th December 1993 “work, employment and training”, JOFR 21st of December 1993; Article 89 of Statute n°2005-882 “for the benefit of small and medium undertakings”, 2nd August 2005, JORF 3rd of August 2005; Decree n°2007-1739, 11 December 2007, “on the translational posting of workers”, JO 13th of December 2007; Circular DGT 2008/17, 5th October 2008 “on the trans-national posting of workers in the French territory in the framework of a provision of services”.

- in the context of a service provision where the recipient is either established or undertakes activities in France.
- In the context of infra-group or infra-plant mobility;
- or in case of work done on behalf of an employer in the absence of any contract for the performance of a service between him and a service recipient. This type of ‘posting’ is acknowledged in the national report as outside the Directive’s scope of application.

Article L. 1262-2 C.trav provides that “posting of workers” can also occur in the context of temporary agency work where the temporary work agency is established abroad. The implementation measures contain further specifications as to the concepts used, which will be discussed in more detail below.

(B) Wide and/or atypical or absent implementation of Article 1 and Article 2

The Belgium implementation law is a clear example of the second method of implementation, in which no definition of posting is given. The 2002 Act applies to anyone who carries out work in Belgium. The precise definition of “posting” as described in Article 1, paragraphs 1-3, of Directive 96/71 has deliberately been left out of the implementation measure in order to make the material scope of the national implementation as wide as possible.¹³ The law does contain a definition of posted worker, though. A “posted worker” is defined as “a worker who carries out work in Belgium and who usually works on the territory of one or more other states than Belgium or who was recruited in another state than Belgium”.¹⁴ The Explanatory Statement appended to the 2002 Act affirms that the type of posting is of no importance for the implementation of the posting directive in Belgium. It was conceived that a detailed description of the types of posting falling within the scope of application would narrow the measure’s effect. According to the rapporteur, the Belgian administration is still very satisfied with this situation, as other Member States that have defined the types of posting are confronted with gaps in their legislation. For the Belgian administration, the condition for material application is relatively simple: as soon as work is being carried out on Belgian territory, the Act of 5 March 2002 applies, regardless of the scope of the work or the period. There are no further specifications provided as to the normal place of work of the worker¹⁵ or the length of the stay.

The Netherlands, too, refrains from including a definition of posting in the implementation measures. The Dutch Wet arbeidsvoorwaarden grensoverschrijdende

¹³ The distinction that was made in the Directive between three types of posting was not adopted in the Act of 5 March 2002. The Explanatory Statement affirms that the type of posting is of no importance for the implementation of the posting directive in Belgium. It was conceived that a detailed description of the types of posting falling within the scope of application would narrow the measure’s effect.

¹⁴ Neither the nationality of the workers nor the country of establishment of the employer is relevant to the application of the 2002 Act

¹⁵ Apart from the requirement that his normal place of work should actually be in one or more countries other than Belgium, of course.

arbeid (WAGA) defines the posted worker as someone who works temporarily in the Netherlands, while foreign law is applicable to their labour contract. Other criteria and distinctions provided in the PWD are not implemented in the Dutch law.¹⁶

The German Arbeitnehmerentsendegesetz (AEntG)¹⁷ is atypical in that it also applies to domestic contracts in specific branches of economy. It creates a legal basis for agreeing minimum wages by collective bargaining and making the outcome binding on all throughout German territory.¹⁸ Insofar as the AEntG is a direct implementation of the Directive it is applicable to all work performed (Arbeitsort) in Germany and does not restrict itself to temporary posting as described in the Directive.¹⁹

There is no implementing statute in the United Kingdom. The British government appears to take the view that relevant domestic labour law applies to posted workers working in the United Kingdom, just as it applies to other workers.²⁰ Thus, for instance, the National Minimum Wage Act 1998 applies to a worker who ‘is working, or ordinarily works, in the United Kingdom under his contract’ (section 1(2)(b)). This is widely thought to apply to posted workers where the contractual terms are lower than the minimum prescribed by the Act.

In our opinion, an advantage of the solution chosen by the UK (and to some extent also by Belgium and the Netherlands) is that the protection offered by the national law is not made to depend on difficult issues of interpretation and demarcation caused by Articles 1 and 2 of the Directive. However, the clear disadvantage of this solution is that the rationale underlying the special regime for posted workers might be lost and the specific position of posted workers is no longer identified as such.²¹

Short duration and insignificant posting

Under most implementation measures the national protection of the host state applies from day one. The possibility to partially exempt postings of short duration or

¹⁶ This causes confusion inter alia because in the (domestic) Dutch legal terminology the term ‘posting’ may be used to describe intra-group posting (type b) or posting by TWAs (type c), but contracting and subcontracting (type a) would not be included in the term. See for the effect of this confusion on the legal position of the workers: Kantonrechter Heerlen 24 September 2003, JAR 2003/268, Houwerzijl AI 2004/2 p. 39-41.

¹⁷ BGBl. I 2009, S. 799

¹⁸ On the German system, see section 2.3.

¹⁹ Paragraph 2 states that laws and regulations (Rechts- oder Verwaltungsvorschriften) with regard to the topics mentioned therein also apply to labour relations between an employer established abroad and his workers active/employed in Germany. Paragraphs 3 ff. contain a similar provision for generally applicable collective agreements in certain designated sectors of the economy..

²⁰ Compare COM (2003) 458 p. 8 and C. Barnard, *The UK and Posted Workers: The Effect of Commission v Luxembourg on the Territorial Application of British Labour Law* (2009) 38(1) *Industrial Law Journal* 125-126.

²¹ To give but one example: the UK report notes that any complaints entered by posted workers will not be recorded as such, since they are not in any way distinguished from national workers. Novitz (Formula Working paper UK) observes on p. 2: “Following also from the lack of specific legal implementation of the PWD, there are no registration or control measures which apply to posted workers in the UK.”

insignificant work is rarely used.²² Even the compulsory exemption which is stipulated in Article 3(2) PWD for first installation (when not exceeding the duration of eight days) is not always implemented (namely in Denmark, France and the Netherlands). An exception is France, which reports that some protective measures only apply to postings exceeding one month. This is the case in Article R.1262-1 C.trav with regard to work accidents, Article R.1262-3 C.trav on freedom of expression, Article R.1262-4 on Bank holidays and Article R.1262-7 on delivery of a monthly pay slip.

Accordingly, in most countries short postings are also covered by the rules of the host state.

It is important to realize that according to the ECJ such application may be disproportionate when the gain with respect to the rights of the individual workers is too small compared to the extra administrative burden placed on the employer. We deduce this from the *Mazzoleni* case, in which a security firm established in a frontier region employed workers in other Member States ‘on a part-time basis and for brief periods’. In that case, the national court should check whether the application of the minimum wage provisions of the host state would not be disproportionate.²³ Though this case was rendered under the Treaty (before the implementation period for the PWD had ended), it still seems to be pertinent to cases where Member States have not used their discretion to exempt insignificant and/or short postings.

With regard to the application of host state law to short and insignificant postings, an important finding in the national reports was that, in practice, the rules on posting are unlikely to be enforced in case of incidental postings of very short duration. Moreover, statutes may contain a certain qualification period before the protection offered therein is actually available to an individual worker. This is for example the case with several UK statutes which (also) apply to posted workers: the Agency Workers Regulations 2010 implementing the TWA directive have a qualifying period of 12 continuous weeks of service with the hirer, during which the worker performs the ‘same role’. Protection from unfair dismissal is in most circumstances only available after one year’s continuous employment with an employer.²⁴ Barnard reports on how the then UK Labour Government responded, prior to the decision in *Luxembourg*, to a pre-infraction letter

²² This conclusion was also drawn by the Commission in its Communication to the Council, the EP, the Economic and Social Committee and the Committee of the Regions on the implementation of Directive 96/71/EC in the Member States, Com(2003)458 and the report by Michael Sargeant on the implementation of the Directive in the new Member States of July 2007 (Contract VC/2005/38, Human European Consultancy in partnership with Middlesex University). No exemption is provided in Estonia, Belgium, Denmark, Germany, Italy, Luxembourg, The Netherlands, Poland, Romania, the UK and Sweden (but it is noted that in absence of a statutory minimum wage regime, the exemption would be moot for this element). The 1996 version of the German AEntG contained a general exemption for ‘insignificant work’ which under the 1998 amendments was restricted to the duty to contribute to holiday funds.

²³ *Mazzoleni* C-165/98 para 41: The application of such rules [on minimum wage AH/MH] might, however, prove to be disproportionate where the workers involved are employees of an undertaking established in a frontier region who are required to carry out part of their work, on a part-time basis and for brief periods, in the territory of one, or even several, Member States other than that in which the undertaking is established..

²⁴ The example is given by Novitz, Formula Working paper UK 2010, p. 8.

from the Commission. She notes the argument put forward that the rights set out in the Employment Rights Act²⁵ and elsewhere are usually subject to a qualifying period and therefore truly ‘temporary’ posted workers are usually excluded from protection.²⁶ The French report mentions that several provisions which only apply to postings exceeding one month have qualification periods which also apply to national workers: e.g. workers are only entitled to a fully paid Bank holiday after working for three months or 200 hours. An additional indemnity in case of work-related diseases or accidents is only due after a year of employment in the undertaking. How these general waiting periods are affected by the one-month waiting period in the posting of workers legislation is not known, due to an absence of both case law and parliamentary debate.

Taking these points into account, it seems fair to conclude that extensive formal applicability of the law of the host state is likely to create a sizeable gap between the formal application of host state law and the practical application/enforcement of the protection offered therein.

International transport

The PWD does not exclude transport workers from its scope of application (with the exception of the seagoing personnel of merchant navy undertakings (Article 1(2)).²⁷ This is reflected in the national reports. The implementing statutes and regulations do – implicitly – cover international transport but – with the exception of the French implementation – do not contain any specific rules concerning this sector. The exemption of Article 1(2) for seagoing personnel of merchant navy undertakings is implemented in most of the Member States included in this study, with the exception of the Netherlands, Germany and the UK.

Several national reports do, however, comment on the practical application of the Directive to this sector. In Estonia there is no information on the practical implementation of the PWD concerning (international) transport; the role of the implementation measure in the transport sector is marginal. The same seems to be true of Germany and Romania.

The Danish trade union representatives consulted by the national expert volunteered the transport sector as one of the areas where it is very difficult to monitor whether employers are complying with the posting legislation because it is extremely difficult to monitor who is a posted worker.

²⁵ <http://www.legislation.gov.uk/ukpga/1996/18/contents>.

²⁶ Novitz, Formula Working paper UK 2010, p. 17 with reference to C. Barnard, ‘The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law’ (2009) 38(1) *Industrial Law Journal* 122, 132.

²⁷ Paragraph 17 of the preamble of Reg 1972/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market, OJ L 300/72 confirms the application of the PWD to cabotage activities.

The Italian implementation measure stresses that in the absence of any rules, the criteria for application of the law on posting in the transport sector are not clear. The implementation statute is surely applied in case of the workers posted into branches established in Italy of transport companies with offices in other Member States (intra-group posting). With regard to the transnational provision of the workforce within the sector, it seems that the criterion based on the location of the employer is used in order to identify the applicable law, unless the worker carries out his main activity in the country in which he resides, in which case, the law of the State of residence is applied. The PWD does not seem to be applied to workers travelling through Italian territory to provide transport services.

In Luxembourg the provisions of the Labour Code relating to the posting are deemed to apply to the road transport sector, including cabotage²⁸ and the transnational provision of workforce. With regard to air and train transportation, the labour authorities comment that simple stopovers should not be covered by the PWD, but non-mobile personnel should. As regards transport by road, the employers' organization UEL comments that this sector requires special, enhanced protection to avoid "social dumping". However, the application of the Directive to transport activities may still be problematic. Indeed, the Directive does not clearly distinguish between two situations:

- the provision of transport services as such; and
- the provision of manpower to a company in another Member State to perform services in the field of transportation.

According to the employers' organization, only the second situation should be considered as posting.

The Belgian implementation measure applies to all work carried out on Belgian territory. Transport activities are not excluded from its scope. However, it is acknowledged by the Labour Inspectorate that application and verifiability are complex and problematic. The Belgian minimum wage standards are – for practical reasons – not enforced with regard to transport workers 'in transit'. However, the situation might be different with regard to cabotage. When regular cabotage activities are undertaken on specific sensitive routes – mostly involving transport to and from Belgian ports – the Belgian minimum wage standards are enforced. In such cases foreign employers may be found to abuse the cabotage system for providing domestic transport services on a regular basis.

In Sweden the issue of application of the PWD to transport activities seems to have been a point of discussion during the adoption of the Act.²⁹ According to the Government the Act covers the posting of workers in road, air and rail transport to the extent that the criteria referred to in the Act are fulfilled. In their opinion this would mean that in most cases cabotage procured by a foreign forwarding agent is not covered. However, where there is a contract between the employer and the receiver of the service and all other criteria for posting are fulfilled, cabotage is covered. The Swedish Trade Union

²⁸ This term refers to transport of goods within a state which is not the home state of the transporting company. Cabotage is only permitted to a limited extent within the context of an international service; See Reg 1072/2009 OJ L 300/72.

²⁹ Prop. 1998/99:90 p.16.

Confederation and the Transport Workers' Union objected to this restriction as they favoured the inclusion of all forms of cabotage.

In the Netherlands it is not clear whether the Dutch implementation measure does apply to cabotage and to the transnational provision of work force within the transport sector.³⁰ For practical purposes the protection offered would in any case be severely curtailed by the fact that the personal scope of the most recent applicable (extended) CLA excludes foreign service providers (and thus posted workers).³¹ Apart from the spokeswoman of one of the unions active in the sector (FNV Bondgenoten), none of the interviewees had an informed opinion about the theoretical inclusion and the practical exclusion of workers in the transport sector. With some regularity FNV Bondgenoten encounters and tries to unravel problematic cases concerning the law applicable to international truck drivers, where Dutch firms seem to use creative constructions to prevent their international truck drivers from being covered by the Dutch Transport CLA('s). In 2006, the union even used the 'naming and shaming' method, publishing a black book of abuses involving Polish truck drivers.³²

The French implementation measure also applies to workers in the transport sector (road/river) with regard to cabotage (Statute n°82-1153, 30 December 1982). Until the new codification process of the *Code du travail*, undertaken in 2007-2008, Articles L.342-3 §9 and R.342-12 provided for a maximum duration of cabotage equivalent to 30 days continuously and 45 days discontinuously. These provisions were abrogated by a new Statute (n°2009-1503), which was adopted on 8th December 2009. Currently, Article L.3421-4 of the *Code des transports* provides, in conformity with the new European transport regulation 1072/2009,³³ that in the course of an international operation concerning the transport of goods by road, cabotage is permitted to a limit of three operations (within the French territory), within seven days from unloading of the cargo in France.³⁴ The Statute lays down that special conditions for the application of the posting provisions with regard to transport workers should be provided by decree. This decree (n°2010-389) was subsequently adopted on 19th April 2010. It contains an exemption from the duty to notify the posting of workers to French territory for cabotage activities when the posting does not exceed 8 days.³⁵ However, if the worker stays on French

³⁰ See A.A.H. van Hoek / M.S. Houwerzijl, De toepassing van Nederlandse cao's op buitenlandse chauffeurs in het goederenvervoer over de weg. Op de viersprong van transportrecht, arbeidsrecht, vrij verkeer en IPR. Commissioned by the Dutch social partners in road transport of goods. December 2008.

³¹ Article 2 of the 'CAO voor het Beroepsgoederenvervoer over de weg en de verhuur van mobiele kranen 1 oktober 2008 - 1 januari 2010' states that the CLA is applicable to all employers and employees of road transport companies established in the Netherlands (...).

³² See:

<http://www.fnvtaxi.nl/download/FNV%20Bondgenoten%20Nederlandse%20Uitbuiting%20Poolse%20werknemers%20Jij%20Jerzy%205%20april%202006.pdf>

³³ Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (Text with EEA relevance) OJ L 300, 14.11.2009, p. 72–87.

³⁴ The old limits still seem to apply to transport of persons: see question 63, <http://www.developpement-durable.gouv.fr/-FAQ-cabotage-routier-.html>.

³⁵ For the interpretation of the decree and its application in practice, reference should be made to circular, n°2010/13, 21st of June 2010,

territory to perform other activities (including cabotage activities on other vehicles), notification is required.³⁶ The content of notification rule is adapted as well, to accommodate the absence of a place of establishment of the employer in France.

The overview given above demonstrates both the difficulties of applying the PWD to transport and the importance several stakeholders attach to such application. The topic received ample attention during the revision of the new transport regulation 1072/2009. The end result of the discussions was the inclusion of a consideration in the preamble that states that the provisions of the PWD apply to cabotage activities. However, in our opinion, the PWD itself is unclear as to the extent of its application to international transport (with the exception of seagoing personnel of the merchant navy, to which it does not apply). Several elements of the scope of application contribute to the confusion. The definition of posted worker in Article 2 presupposes that there is a country where the posted worker normally works. It is doubtful whether this criterion can be deemed to be fulfilled when someone is employed as mobile staff and regularly travels between countries. Especially when transport is undertaken from smaller countries (such as Belgium or the Netherlands) the larger part of the journey will usually take place outside the country of origin. In those cases there may be a country *from* which this worker normally works, but not necessarily a country *in* which they work (compare Article 8(2) Rome I Regulation).³⁷ Neither the text of the PWD nor the Rome I Regulation seems to take this situation into account in their definition of temporary posting.

Moreover, Article 1 describes three types of posting which are covered by the PWD, none of which may fit the ‘posting’ which occurs in international transport. The experts and national stakeholders are in agreement that the national implementation should not apply to cases in which the worker only passes through the territory to perform an international service. Neither should the PWD apply to international transport operations ending in the territory. However, the exact reasoning for this exemption is not always clear. The national implementation measures do, however, seem to apply in the case of *cabotage*. In that case non-application of the rules of the place of performance of the service to foreign service providers would create an unlevel playing field for local transport companies. With the opening up of the local markets to cabotage, the application of a minimum level of protection to the workers performing the cabotage service is becoming more pressing, as was acknowledged during the negotiations on the new transport regulation.³⁸

In the case of cabotage a service is provided in the host state.³⁹ Hence, cabotage could be subsumed under type a) posting: posting of workers to the territory of a Member State on

³⁶ See also question 63 in the FAQ cited above.

³⁷ Compare also ECJ 15 March 2011, C-29/10 (Heiko Koelzsch v État du Grand-Duché de Luxembourg).

³⁸ See preamble para 17 and 18 of Reg. 1072/2009 and Draft recommendation for second reading on the Council common position for adopting a regulation of the European Parliament and of the Council on common rules for access to the international road haulage market (recast) A6-0211/2009 (11788/1/2008 – C6 0014/2009 – 2007/0099(COD)) Committee on Transport and Tourism Rapporteur: Mathieu Grosch p. 15/16.

³⁹ However, the same seems to be true of an international transport operation ending in the host state. The place of performance of a transport service can be deemed to be situated in both the country of origin and

the account and under the direction of the undertaking making the posting, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting. However, as the Swedish report points out, this would mean that there has to be a contract between the transport company and a service recipient operating in the state where the cabotage takes place. In Sweden such a contract is deemed to be absent when the contract with the transport company was entered into by a forwarding or freightage agency established outside the country of cabotage.⁴⁰

Several national reports⁴¹ demonstrate that the other modalities of ‘posting’ are also used in international transport. To give an example: a Dutch transport company may contract with a Polish company (which may or may not be a subsidiary company established for that purpose) for the provision of manpower or the subcontracting of transport services. Such outsourcing or subcontracting has a considerable impact on conditions in the Dutch transport market. Moreover, when the Polish worker used for the services regularly works from the Netherlands rather than Poland, his labour contract has a close link with the Dutch labour market. This would merit protection according to Dutch labour standards. However, the PWD does not offer a solution to this problem when the transport service itself is largely performed outside the Netherlands, because its system is based on the premise that posted workers are working temporarily *in* another country than the one *in* which they normally work. The system does not seem to fit the situation in which someone is working *from* a country, as is the case in international transport.⁴²

The lacuna becomes all the more evident when cross-trade is taken into account. In this case, a worker regularly plies the route between country A and B, but is employed by a company established in country C. In such a case another discrepancy comes to light: namely, the discrepancy between private international law and the free movement of services. The free movement of services is a freedom that focuses on the provider of the service, which in this example is based in country C. The Rome I Regulation, however, decides on the law applying to the contract of the individual worker. When this worker is habitually employed from country A, the law of country A may apply to the contract of employment. However, this individual perspective often is lost when discussing the obstacles which may be caused by the application of national labour law to the free provision of services.

the country of destination. Compare Commission notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372/5 and Commission Decision C(2008)8458 final of 17 December 2008 in Case No COMP/M.5141- KLM/Martinair, para 28 ff. and para 103 ff for EU competition law and ECJ 9 July 2009, Case C-204/08, Peter Rehder v. Air Baltic Corporation, para 29 ff for the place of performance of the service under the Brussels I Regulation. In the case of cabotage, both places are located within the same state.

⁴⁰ This (debatable) conclusion draws attention to the fact that the definition of type a posting may pose problems in cases where the end user of the service has no contract with the employer. See below.

⁴¹ Illustrative examples were given in the reports for Italy, Romania and the Netherlands. See also the overview of cases in section 3.5.

⁴² Van Hoek/Houwerzijl, Report for the Dutch social partners in transport 2008, o.c.

Provision of a service

Although the PWD was adopted in the context of the free provision of services, the national implementation measures do not always contain this requirement in order that national law shall apply to the worker (as was noted already above under the general remarks on the implementation of Article 1 and 2 PWD). The requirement has two related aspects:

- (1) should the posting be connected to provision (by the posted worker) of a cross-border service in the meaning of Article 56 of the TFEU? This requirement seems to follow from the scope of application of the directive as defined in Article 1 sub 1.
- (2) should there be a service contract between the employer and a recipient established or active in the country where the service is performed? The latter requirement is mentioned in Article 1(3)(a) and (c), but does not seem to be a prerequisite in case of intra-company postings (Article 1(3)(b)).

In several Member States the national provisions apply to all work performed in the territory regardless of the underlying reason for the ‘posting’ (France, the UK, Poland, the Netherlands, Belgium). However, in countries which transposed the Directive more or less literally into national law (e.g. Estonia, Romania, Luxembourg, Italy and Sweden), the requirement of an underlying service provision and/or service contract will usually be present.

The effect of this difference in approach is clearly demonstrated by the French Circular which accompanies the implementing statute (Circular no DGT 2008/17, 5th October 2008). This circular specifies that the provision of services is not the sole context in which posting might take place. It distinguishes a) services provision in the meaning of Article 56 TFEU, b) intra-group postings, c) provision of manpower and d) the realisation of a project for the account of the employer. As regards intra-company posting within a group of companies (type b posting), the Circular specifies that this type of ‘posting’ might not be based on a contract of services between the two companies involved but might rather be part of a rotation scheme in a trainee program or a career track. For the fourth category of situations covered by the implementing statute the circular refers to such activities as the activities of filmcrews, employees on business trips and attending seminars, and harvesting activities. According to the circular, all four types of ‘posting’ are covered by the implementing statute.

Whether or not these types of ‘posting’ are covered by the implementation measures of the other Member States depends primarily on the formulation and interpretation of their scope of application. For example, the Belgian implementation is based on the criterion of ‘working in Belgium’. This term could refer to anyone who is sent to Belgium in the line of work. Thus it would include employees sent to Belgium to attend classes or follow a training program. This is not how it is interpreted, however: the relevant criterion is whether the worker, during his stay in Belgium, performs economically relevant activities which are not marginal. This excludes workers sent to Belgium to attend purely theoretical courses. This criterion is deduced from a similar distinction in migration law. Moreover, it echoes the case law on the free movement of workers (Article 45 TFEU),

rather than that on the free movement of services.⁴³ In other countries which apply the place of work criterion, such as the UK and the Netherlands, the application of the national provisions to trainees and people attending seminars is unclear.

In Luxembourg the requirement of a provision of services by the posting undertaking for the benefit of a recipient in Luxembourg seems to exclude posting for the purpose of training from the scope of application of the implementing statute as it is assessed that these workers are receiving services rather than providing them. However, as in Belgium, the actual application of Luxembourg law may depend on the type of training (purely theoretical or involving the performance of productive work in Luxembourg – training on the job). Again, as in Belgium, this distinction is deduced from migration law.

Denmark seems to require a service contract to underlie the posting, although the interpretation of the requirement is not entirely clear. Categories of ‘posting’ which might be excluded from the scope of application of the implementing statutes due to the absence of an underlying provision of service are workers on an occupational training course, foreign correspondents, sales agents, and transferred staff of multinational enterprises.⁴⁴

In Italy, under domestic law intra-company transfers with continuation of the original labour contract with the posting company are only permitted when they are *not* provided for remuneration. They must be temporary in nature and be implemented to pursue an interest of the posting employer. If these requirements are not met, the posting is deemed illegal and the worker may demand a declaration that the host undertaking has become the employer. If applied to transnational situations, this provision basically excludes type b posting as defined in the PWD to occur in the context of the provision of services. Posting for training purposes would be permitted, however, and would be covered by the Italian implementation of the PWD.

As a matter of fact, the requirement of an underlying service in the meaning of Article 56 TFEU has become very prominent in the latest amendments to the posting regulation in Luxembourg, introduced in 2010 in response to the judgment in the Commission/Luxembourg case.⁴⁵ A paragraph was added to Article L. 141-1 (2), stating that « The postings referred to in points 1. to 3. above should take place within the framework of a contract of provision of services covering an object or a specific activity limited in time and ending with the execution of the contract. »

The definition of posted worker was also amended. Article L. 141-1, paragraph (3) now reads: « Posted worker means any employee who regularly works abroad and who carries out his work in the Grand Duchy of Luxembourg, during the limited period determined by the specific provision of services for which the contract of provision of

⁴³ See for a recent example C-413/01 Ninni-Orasche para 26. “In order to be treated as a worker, a person must nevertheless pursue an activity which is effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and accessory.”

⁴⁴ R. Nielsen and L. Roseberry, Dansk Arbejdsret, Jurist- og økonomiforbundets Forlag 2008, 317.

⁴⁵ C-319/06.

services as defined in paragraph (1) and paragraph (2) was concluded. The limited period is assessed in terms of duration, frequency, periodicity and continuity of the provision of services and in relation to the nature of the activity that is subject to the posting.»⁴⁶ Hence, the Luxembourg law is clearly based on the case law of the ECJ on the distinction between the free provision of services (Article 56) and the freedom of establishment (Article 49).⁴⁷

The French law applies a similar criterion, based on the distinction between services and establishment. According to Article L.1262-3 in order to fit the definition of posting the activities of the foreign employer must not be wholly or substantially orientated to the French market. More precisely, the foreign employer must neither undertake his activities from a plant and/or by means or infrastructure regularly, firmly and continuously established in France, nor seek to contract clients or hire employees in France.⁴⁸ The previously mentioned circular interprets these provisions as imposing on the foreign employer the onus of having previously undertaken a significant activity in the country of origin. The aim of the provision is to avoid the creation of “enterprises boîtes aux lettres” (letter box companies). However, it is also mentioned that the mere fact that a foreign undertaking disposes of a plant in France is not sufficient in itself to exclude a situation of posting of workers. Nevertheless, if it becomes obvious that a foreign undertaking engages in stable and continuous activity in France, it must establish itself according to French law and apply French legal standards to its workers.

In summary, requirements regarding the provision of services in the meaning of Article 56 TFEU may act both as a restriction on the application of the local minimum protection (when no relevant economic service is provided by the posted worker) and as a justification for offering more protection to the worker than the minimum requirements of the PWD (in the case of France and Luxembourg). In contrast, the absence of any requirement regarding the service to be performed, as is the case in Belgium, the Netherlands and the UK, may overextend the application of the posting regulation (in both directions).

With regard to the requirement of an underlying provision of services, two points of uncertainty are reported which are related directly to the formulation of the scope of application of the Directive. Several experts report on problems as regards trainees, who may both receive services (training) and perform services. The Italian expert raises the question whether intra-company posting should also be covered when there is no service against remuneration (as would be the case under Italian law).

With regard to two types of posting (type a and type c posting), the Directive seems to add the requirement of an underlying service *contract* between the employer and the recipient of the service (who has to be established or active in the host state). This requirement – if interpreted narrowly – might (sometimes unduly) restrict application of

⁴⁶ Translation provided by the Cabinet of Guy Castagnero.

⁴⁷ See C-55/94 (Gebhard).

the posting provisions. In the section on transport workers we discussed the problems Sweden perceives with regard to cabotage services through an intermediary. But a similar problem may arise with regard to TWA workers who are posted abroad by the user enterprise in order to perform a service there (this system is referred to as ‘Huckepack’ in Germany). In that case there is a (domestic) service contract between the TWA and the user company as well as a (cross-border) service contract between the user company and the recipient of the service. But a contract between the employer and the recipient of the cross-border service is absent.

Habitual place of work

The PWD defines the posted worker as a worker “who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works”. From the strict letter of the provision, the PWD does not apply when the worker does not have a country where he normally works. Hence, previous employment in the habitual country of work is part of the definition of ‘posted worker’. However, a literal reading of Article 2(1) PWD does not seem to require explicitly that the work normally performed by the posted worker in the country of origin is performed for the employer who is responsible for the posting.⁴⁹

That being said, it must be added that such a literal interpretation of Article 2(1) PWD would disregard the close connection between the PWD and the Rome I Convention (now succeeded by the Rome I Regulation), as laid down in the Preamble of the PWD (see in particular recitals 8, 9 10). Article 8 of the Rome I Regulation refers to the habitual place of work *under the contract*. Hence, if someone is hired for the purpose of posting, there will be no habitual place of work in the country of origin, at least not under the contract. However, the law of the provider’s country of origin might still apply to the contract. This could be the case when the worker does not perform his work in or from any one country (in which case Article 8 of the Rome I Regulation refers to the country where the employer is established) or when the country of origin is for other reasons the country most closely connected to the contract. Because of the open character of Article 8, the outcome of the choice of law rule is based on the circumstances of the individual case. The more difficult cases to decide would be when a worker is hired for the purpose of posting and is dismissed again after the posting has ended (which is not unusual in the case of temporary agency work) or when a worker works regularly in the host country on consecutive contracts for the provision of services. In such cases, the only place where work is performed under the contract will be the host country. Hence, under Article 8 Rome I a court will have to apply the law of the host country unless one of the parties demonstrates that there is a closer connection with the country of origin. Factors taken into account by courts include the common origin of worker and employer,⁵⁰ specific

⁴⁹ Thus, a purely literal reading would fit with the posting rule with regard to social security: previous insurance in the country of origin is required, not necessarily previous engagement with the posting undertaking. See Article 12 Reg. 883/04.

⁵⁰ Traditionally, under Polish law, common Polish nationality used to be enough for the Polish labour law to apply. Under German private international law as interpreted by the *Bundesarbeitsgericht*, common

expatriate provisions in the contract, the continuation of residence for tax purposes and the continuation of social insurance coverage in the country of origin (E101). Accordingly, the fact that the employer rather than the worker bears the costs of expatriation may be a factor indicating a closer connection to the home country. Conversely, payment of travel and subsistence costs by the workers themselves is an argument for applying host state law.

The individual character of Article 8 of the Rome I Regulation makes it ill fitted to dealing with displacements of groups of workers. Moreover, as mentioned above in section 2.2, the choice of law rule of Article 8 has only limited significance with regard to statutory protection⁵¹ and protection through collective labour agreements (CLA's). But it is important to realize that the idea underlying the PWD – offering minimum protection in specific areas – seems to be based on the presumption that the posted worker's contract is governed by a law other than that of the host state. Hence, it must be concluded that the PWD must be applied in line with the Rome I Regulation. Several reports underline this interaction. For example, the Dutch implementing statute specifically refers to a foreign law being applicable to the contract. The Swedish and German reports specifically mention that the PWD implementation is only relevant for contracts under foreign law.⁵²

Moreover, the types of employment which are deemed problematic from the point of view of posting under the PWD are often also problematic from the point of view of the Rome I Regulation. We refer here to work through temporary work agencies, especially when the worker is not retained on a regular contract by the TWA, but only hired for the purpose of posting, and especially if the worker is made redundant on termination of the service, and in situations of consecutive or rotational posting in which the worker does not return to a job in the country of origin but works abroad permanently. The absence of any regular economic activity of the employer (apart from administration) in the country of origin, excludes the application of the special posting rule of Article 8 of the Rome I Regulation.

The requirement as to the habitual place of work is largely neglected in the implementation measures of the Member States covered by this study. Countries which seem to have specific checks on the link with the country of origin are France and Italy, but in these two countries the focus seems to be on the activities of the employer rather than those of the employee. Due to the strict restraints imposed on posting in the internal law, the Italian authorities regularly check whether a posting is performed by a genuine undertaking established in the country of origin and whether there is a real and continuing employment relationship between that undertaking and the posted worker.

nationality is a factor to be taken into consideration when determining the applicable law: see inter alia BAG 29 oktober 1992 – 2 AZR 267/92 *IPRax* 1994, 123 (Pilotenentscheidung). See for case law under the Rome Convention (and the similar rule of Dutch private international law), A.A.H. van Hoek, *Internationale mobiliteit van werknemers*, Den Haag: Sdu 2000.

⁵¹ It should be born in mind, though, that statutory protection may also depend on a habitual or temporary place of work within the territory – this is the case in the UK, for example.

⁵² Compare also Martin Gräs Lind, *The Danish law on the posting of workers*, Formula Working paper no 24 2010, p. 5-6.

As mentioned previously, French law requires that the worker is normally employed for an employer who is regularly established abroad.⁵³ The activities of the employer should not be wholly or substantially oriented to the French market. The undertaking should not have an establishment in France nor seek to contract clients or hire employees there.⁵⁴ Hence, the posted worker must have been employed prior to the posting⁵⁵ and return to their country of origin thereafter. These latter criteria are directly related to the individual worker's habitual place of work. With regard to the posting of third country nationals, the ECJ does not allow Member States to impose minimum requirements as to the time of service prior to the posting.⁵⁶ The French circular accompanying the implementing statute specifically refers to this case law when explaining why the French posting regulation does not require a specific period of previous employment in the home state either.

Luxembourg has narrowed down the definition of posting in response to the ECJ interpretation of the PWD (in this case, particularly after *Commission v. Luxembourg*). But basically it did so by regulating the concept of services (see the previous section), not by specifying a territorial link between the labour contract and the provider's country of origin.

By contrast, the Belgian implementation has considerably relaxed the requirement in the PWD regarding the link between the worker and the country of origin. A "posted worker" as defined by the Act of 5 March 2002 is "a worker who carries out work in Belgium and who usually works on the territory of one or more other states than Belgium *or who was recruited in another state than Belgium*" (emphasis added AH/MH).

Temporary

One of the most controversial issues regarding posting of workers is the definition of 'temporary'. When the Rome Convention of 1980 was transformed into the Rome I Regulation a fierce debate took place on exactly this issue. It turned out to be impossible to reach agreement on a definition of temporary posting in the text of the regulation. However, some indications were included in preamble (36),⁵⁷ which reads: "As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily." The second sentence actually expands the notion of posting. It can be traced to a proposal of the Groupe Européenne de Droit

⁵³ The Circular requires *significant* activity in the home state.

⁵⁴ L1262-3; See also the previous section.

⁵⁵ This requirement does not apply in the case of TWAs.

⁵⁶ See C-244/04, ECJ 19 January 2006, *Commission versus Germany*

⁵⁷ In the Commission Proposal Com(2005)650final the specifications were contained in the relevant Article itself, rather than in the preamble.

International Privé⁵⁸ and caters for expatriates who, for reasons of immigration, might enter into a contract with an establishment in the country of posting while maintaining their contractual link with the original employer in the home country. The first paragraph is meant to narrow down the concept. It again highlights the importance of economic activity in the country of origin (a place of work to return to), but does not contain any specific limits as to time and/or purpose of the posting.⁵⁹

Not many countries have included further requirements with regard to the temporary character of the posting in their measures implementing the PWD. A noticeable exception is Luxembourg, which added extra requirements in 2010 (see above, beginning of section 3.2).

The report on Poland pointed out that successful service providers may be more or less permanently active in other Member States without opening an establishment there. Accordingly, some of these service providers' workers may be permanently posted in a single host state, only returning home for time off and holidays. It would seem that the Luxembourg implementation in its current form would require the employer to recall his workers after termination of a specific service contract. It is not entirely clear, however, whether the same worker could return after a short break to perform the next contract.

French law also contains some extra requirements relating to the temporary character of the posting as it specifically does not permit consecutive posting to permanent positions. However, this requirement refers to the character of the position taken up by the posted worker rather than the temporary character of the posting itself.⁶⁰

A third element of the temporary character refers to the temporary character of the service provision – distinguishing it from establishment. This notion of temporariness is also present in French and Luxembourg law (see above).

Moreover, several notions of temporariness are used in the Member States as regards the posting itself.⁶¹ The term could refer to postings of short duration,⁶² or rather postings with a predetermined duration and/or predetermined, objective reason for termination,⁶³ or both.

⁵⁸ See the Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization Com(2002)654final p. 37. The proposal was strongly supported by inter alia the German Max Planck institute in their comment on the Green Paper. See: http://ec.europa.eu/justice/news/consulting_public/rome_i/contributions/max_planck_institute_foreign_private_international_law_en.pdf p. 65 ff.

⁵⁹ Green paper Com(2002) 0654 final, p. 36-37.

⁶⁰ See in this regard also the Conclusion of AG Bot in Cases 307-309/09 (Vicoplus) for the relevance of both elements.

⁶¹ For the discussion of 'temporary posting' under the Rome I Regulation, please refer to Com(2002)654final p. 35 and Max Planck Institute o.c. p. 65 ff.

⁶² This element seems to be present in the Danish definition. See inter alia Gräs Lind, Formula Working paper Denmark p. 5 en the Danish report to this study.

⁶³ This criterion is used inter alia in France and Luxembourg.

A maximum time limit for posting, linked to the maximum used in EU social security, was proposed inter alia in Luxembourg (Bill 5942). This proposal was not accepted, however; the current system does not contain a specific maximum duration, merely referring to the temporary character of the posting in the second meaning. The German expert reports that in Germany the posting should generally not exceed 12 months to be classed as temporary. The centre of the worker's activities should be located abroad and the worker should be given the option to return to the country of origin on termination of the posting. When these requirements are not met, German law is deemed to apply by virtue of the Rome I Regulation. This interpretation of the private international law provision is not uncontested: it is also advocated that any 'posting' that is not definite and final, is temporary.⁶⁴ Moreover, the criteria are not included in the statute implementing the PWD.

Italian law contains a specific provision based on the latter criterion: the posting must have an 'upfront predetermined or predeterminable duration with reference to a future and sure event'. Accordingly, there is no maximum duration, but the termination of the posting must be based on objective factors, either by specifying a period or specifying the relevant event (e.g. the end of the construction project).

⁶⁴ The report refers to Junker ZIAS 9 1995, 555, 586.

3.3 THE IMPACT OF DOMESTIC LAW ON THE LEGALITY OF THE DIFFERENT TYPES OF POSTING

As mentioned above, in Article 1(3) the PWD distinguishes different types of posting:

- (a) posting of workers to the territory of a Member State on the account and under the direction of the undertaking making the posting, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting;
- (b) posting of workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting;
- (c) being a temporary employment undertaking or placement agency, the hiring out of a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

As the national reports made clear, for all three types of posting, national law may impose certain restrictions which also affect cross-border posting. The most conspicuous example of this is Italy. This country has rather strict requirements on the provision of manpower or ‘domestic posting’ in which a worker is posted to perform activities within the work organization of another employer (appalti interni, D.lgs 276/03). A domestic posting could be the result of subcontracting (type a), posting within a group (type b) or hiring out through a TWA or placement agency (type c). In all cases, Italian law imposes strict requirements on the posting before it can be regarded as legal. For example, posting within a group cannot be against remuneration and the sending enterprise has to retain an interest in the ‘posted’ worker’s contract of employment. If the requirements for posting are not fulfilled, the posting is illegal. These rules apply to any domestic posting to a company in Italy but also seem to offer the Italian authorities the possibility to monitor the situation both of workers posted within Italy and workers posted from another EU Member State. One of the sanctions against illegal posting is that the user enterprise can be designated to be the real employer. If this were to happen in a cross-border posting situation, the employment relationship would lose its cross-border character as the new employer would be Italian and the place of work would be Italy – the nationality of the worker is irrelevant in this respect.

Likewise, national law may contain specific rules on subcontracting. In Sweden, Sections 38 and 39 of the Co-determination Act afford trade unions the right to negotiate and possibly even veto the engagement of a certain contractor. Again, this affords a certain measure of control over the employment conditions of the workers involved, in both domestic and cross-border subcontracting. A similar construction is used in the UK NAECI agreement (a major CLA in the construction sector). See in this respect also section 4.4.

Besides this, quite a number of Member States have restrictions regarding TWAs and placement agencies. TWAs often need to be licensed.⁶⁵ Use of temporary workers may be restricted in some sectors of the economy, such as construction⁶⁶ and transport⁶⁷ (see further below).

⁶⁵ This requirement is reported in Italy, Romania, France and Luxembourg.

⁶⁶ Belgian law contained this restriction until 2002; German law still does.

⁶⁷ German law contains this restriction.

3.4 TRANSITIONAL REGIME

Several ‘old’ Member States (EU15) applied or still apply a transitional regime in regard to the free movement of workers from eight of the ten new Member States in 2004 (EU8) and of the two other new Member States (Romania and Bulgaria, EU2) which acceded in 2007. Only Germany and Austria also negotiated the possibility of imposing restrictions to the free movement of services insofar as these involved cross-border posting of workers. A study of the transitional regime is interesting in the current context for several reasons:

- The actions taken by the Member States during this period may provide information as to the areas which are deemed problematic in respect of labour mobility within Europe.
- In countries that allow the free provision of services (Article 56 TFEU) but not the free movement of workers (Article 45 TFEU), the transitional regime sheds light on where the Member States draw the line between the two freedoms, and thus on the distinction between a ‘posted worker’ and a migrant EU worker, using Article 45 TFEU.

The transitional regime permitted Member States to treat workers from the designated new states as third-country nationals. This basically means that those workers needed or still need permits before being permitted to enter the labour market of the host state. The permit requirement in turn made/makes it possible for the host state to impose further requirements, for example with regard to housing and/or employment conditions, in conformity with their migration law regimes governing foreign labour from outside the EU.

It should be noted here that requirements on housing and employment conditions, especially as related to temporary foreign workers, address concerns which also arise in regard to mobility outside the transitional period. In some countries, however, the transitional period offered political and legal opportunities to address them more systematically. Both the Belgian and the Dutch reports show that lifting the transitional regime was made dependent on measures that would ensure improved enforcement of labour law and improved monitoring of mobility. In the Netherlands the measures also included better cooperation between authorities as to the housing of groups of migrant workers. In the two countries the debate surrounding the transitional regime led to a ‘fall out’ of measures which were intended to outlive the transitional period and which still apply today.⁶⁸ Moreover, the Dutch debate on when and under what conditions the transitional regime should be lifted has triggered extensive research into migratory flows

⁶⁸ The Netherlands introduced an administrative fine for violation of the minimum wage act, intensified cooperation between enforcement authorities, exchange of information with authorities responsible for housing and liability of user companies of TWAs with regard to wages; Belgium introduced the Limosa declaration, joint and several liability for contractors and professional customers, a protocol for cooperation between social inspection services and access to court for posted workers.

from new EU countries into the Netherlands and the economic effect thereof on the local economy.⁶⁹

It is also interesting to note that several countries have adopted a sectoral approach to the transitional regime, only imposing it in specific sectors (e.g. the restrictions on posting of workers in Germany) or lifting parts of it in some sectors while retaining it in others (Belgium/France/Italy/the Netherlands). The Italian report, for example, mentions agriculture, tourism, construction, and the food processing industry. France has relaxed requirements in such sectors as construction, agriculture, tourism and catering. Interestingly, the special exemption made to the transitional regime in these aid countries to a great extent pertains to sectors with a relatively great presence of posted workers⁷⁰ and a relatively high incidence of controversial cases (section 3.5). However, as these are the sectors in which these Member States experience labour shortages, a more generous regime was adopted vis-à-vis the new Member States anyway.

In countries which imposed a transitional period for free movement from the new Member States, it was often suggested that this would create an incentive for workers to 'switch' to other channels for labour migration to the old Member States, such as through the free movement of services (as a posted worker or as 'posted' self-employed or through the freedom of establishment (as self-employed). To different degrees, the national reports do indeed mention suspected or demonstrated shifts in migration modalities from regular labour migration to undeclared work, true or bogus self-employment and posting of workers.⁷¹ A particularly problematic point concerned the status of workers from the EU8 /EU2 countries who are posted to EU15 Member States by TWAs. The national reports reveal that a major conflict has arisen around this issue: Several Member States (Belgium, Denmark, Luxembourg and the Netherlands) consider those 'posted' agency workers as subject to the restrictions on the free movement of workers – a view that is strongly opposed by other Member States (e.g. Romania) and the EC. In its judgment of 10 February 2011 the ECJ sided with the former and deemed the Dutch transitional regime at this point to be in conformity with EU law.⁷² This conflict

⁶⁹ E.g.: Research voor beleid, Grenzen stellen. Omvang van en maatregelen tegen malafide praktijken in de uitzendbranche, September 2010, commissioned by Stichting naleving CAO voor uitzendkrachten; TNS NIPO, Poolse nieuwkomers in Nederland, 2009, commissioned by PoPolsku, the main Polish newspaper in the Netherlands, in consultation with ABU, OTTO Workforce, HollandZorg; Regioplan, Europese grenzen verlegd: Evaluatie flankerend beleid vrij verkeer werknemers uit MOE-landen, 2008/07; Ecorys Nederland BV, Evaluatie werknemersverkeer MOE-landen, rapport in opdracht van het Ministerie van Sociale Zaken en Werkgelegenheid, Rotterdam 13 februari 2006; H.M. ter Beek, J.W.M. Mevissen, J. Mur & C. Pool, *Poolshoogte. Onderzoek naar juridische constructies en kostenvoordelen bij het inzetten van Poolse arbeidskrachten in drie sectoren*, Amsterdam: Regioplan Beleidsonderzoek: 2005; M. Zuidam en D.H. Grijpstra, Over de Grens. Een onderzoek naar illegale activiteiten op het gebied van uitzendarbeid, Leiden, 2004; Research voor Beleid 2004; CPB-Notitie, 'Arbeidsmigratie uit de Midden- en Oost-Europese lidstaten, 14/1/2004: www.cpb.nl/nl/pub/notitie/14jan2004/notitie.pdf.

⁷⁰ See Tender specifications to the Study on the economic and social effects associated with the phenomenon of posting of workers in the European Union VT/2009/062 p. 5-6.

⁷¹ Romania, the Netherlands, Denmark, Italy, France.

⁷² C-307-309/09, Vicoplus, not yet reported. Conclusion AG delivered on 9 September 2010.

again highlights the problematic position of TWAs in the context of cross-border posting.⁷³

But also outside the context of the TWA discussion, it would seem that transitional measures were sometimes imposed on the posting of workers within the framework of the provision of services. In the Netherlands, from 1 December 2005 on,⁷⁴ type 1 posting was deemed to be exempted from the transitional regime. Both the provision of manpower⁷⁵ and the posting within a group of undertakings were covered by the restrictions. The Danish report mentions that when a posting exceeded three months in duration, the worker needed a residence permit. This would only be granted if certain requirements were met:

1. The posted worker must be permanently employed in the posting enterprise.
2. The posted worker must – before being posted – reside legally in a Member State and have the right to work there.
3. The posted worker must have the intention and be able to return to his home country or the business's country of domicile when the work is completed.

The Danish requirements are similar to those that are imposed when non-EU workers are posted to EU countries. They are intended to ensure a regular situation in the country of origin and hence to ensure that the worker is in a 'genuine' posting situation. In a similar vein, the Netherlands would check, in the case of exempted postings from the transitional regime, whether the sending company was genuinely established in the home country and performed regular economic activities there, or was rather a letter box company.⁷⁶ In the UK, where no transitional measures were imposed, non-EU nationals nevertheless need to be in possession of (temporary) residence permits, even if they are legally and permanently residing in a Member State and are posted by an EU-based service provider (see also below, section 4.2).⁷⁷

⁷³ The French report acknowledges that indirect obstacles for TWAs from the EU8 and EU2 may have been caused by the French requirement (also applied in Luxembourg) that posted workers should have a certain period of previous employment with the posting firm before being posted.

⁷⁴ By then, a so-called notification duty entered into force for type 1 postings (see Article 1e (1), Besluit uitvoering Wav, 10 november 2005 Stb. 2005, 577). Before 1 December 2005, the Dutch transitional regime included all types of posting covered by the PWD. See in this regard Press Release: IP/05/337 (18 March 2005) on a letter of formal notice of the Commission – the first step in the infringement procedure – to the Dutch authorities to submit its observations on the obligation imposed on service companies in certain new Member States to obtain work permits before posting their workers to the Netherlands. For more details on the old regime see Houwerzijl, M.S., T. de Lange, C. Pool (2005), De 'status aparte' van werknemers uit de nieuwe EU-lidstaten. *Migrantenrecht* 2005/5, p. 148–156. For a recent update of this 'saga' see: T. de Lange, 'Nederlands Arbeidsmigratiebeleid en de Europese interne markt, een gestaag proces van toenadering', *SEW* 2010/9, p. 336-347

⁷⁵ This restriction was contested in the *Vicoplus* and other cases.

⁷⁶ This would be the case in type 1 posting of non-EU workers (or EU workers under a transitional regime) by an EU undertaking. However, this part of the Dutch notification regime was recently declared in breach of EU law by the Dutch Council of State (ABRvS 17 maart 2010, LJN: BL7833; ABRvS 7 april 2010, LJN: BM0205).

⁷⁷ See recent Judgment of Court of Appeal, 'Low and others, R (on the application of) v Secretary of State for the Home Dept [2010] EWCA Civ. 4, which seems to be in breach of EU law, cited by T. Novitz, Formula Working paper UK.

3.5 CASES IN THE MEDIA AND IN COURT

Purpose of this overview

In their reports the national experts have given an overview of contentious cases, both in court and in the media. There were three main aims to this exercise:

- To identify trends as to the countries and sectors in which problems are reported.
- To identify whether the contentious cases concern aspects of posting or rather other forms of labour mobility.
- To identify general trends as to the application and enforcement of the PWD.

Annex I contains a full list of cases reported in the media, with references. Annex II contains a list of court cases related to the posting of workers. The specific aspects of enforcement by bringing cases to court are dealt with in greater detail in section 4.5.

General

The overview of cases contained in the Annex clearly demonstrates the different positions Member States have in the debate on posting of workers. This position depends inter alia on the comparative wage levels and the status of the Member State as predominantly a sending or predominantly a receiving state.

There has been and still is a heated debate – leading to numerous cases (either in the public discussion or in court) – in the ‘old’ Member States covered by this study: Germany, Belgium, Luxembourg, France and the Netherlands. There is much less interest in sending states such as Estonia, Poland and Romania. The discussion in Sweden, Denmark and the UK is of fairly recent date and focuses very much on the position of the social partners.

By far the most media attention is devoted to the position of the foreign (posted) workers. But in Romania, the obstacles encountered by Romanian undertakings when posting workers abroad have also received ample attention. The fact that these problems relate to the transitional regime seems to play an important role here.

If the reported cases are organized by sector, three sectors stand out: TWAs,⁷⁸ construction⁷⁹ and transport by road.⁸⁰ Agriculture, too, has produced a decent crop of

⁷⁸ Identifiable cases involving TWAs and/or the illegal provision of manpower are Belgium: Struik foods media case no 1, La Corbeille media case no 2; RSZ/Frangema Staal court case no 1 and Corr.Gent 21/2/2007 court case no 4; France: Metz case, media case no 17, Apple juice company, court case no 19, court case no 22; Italy: Arenjobs media case no 22, Romanian nurses media case no 23, court case no 31; Luxembourg: court case no 37; The Netherlands: media cases no 28, Struik media case no. 32; Romania: Romania-The Netherlands media case no 33; Sweden: Berry pickers, media case no 35, Preemraff media case no 38, Skanska/Adecco media case no 39; UK: Kalwak court case no 40.

⁷⁹ Belgium: court case no 1 and no 5; Denmark: Aarhus, media case no 7, Vytauto, media case no 8, Gal-Met, court case no 12, court case no 14, Net Construction, media case no 9 / court case no 17; France: Saint

cases, but these are often not strictly related to posting.⁸¹ Other sectors which are mentioned more incidentally are health services,⁸² shrimp peeling and cleaning,⁸³ and meat cutting and other food processing industries.⁸⁴

These findings in fact confirm the choice that was made with regard to the sectors mentioned in the Tender specifications to the Study on the economic and social effects associated with the phenomenon of posting workers in the European Union VT/2009/062 (p. 6) as being the six sectors where posted workers are relatively more present (construction, transport, hotel, restaurants and catering, agriculture, fisheries and temporary agencies).

Posted workers as a distinct group

What is evident from the overview of cases reported in the media, is that posting of workers in the context of the provision of services is but one of the many ways for EU citizens to work abroad. People may look for work in other Member States, using their right to free movement of workers, go there as self-employed or be posted by an employer company in their home state. The general media, when reporting on cases involving foreign workers, most often do not distinguish between the different migration modalities. This may be explained by the fact that all these modalities seem to lead to very similar actual work patterns and problems. With regard to the latter, media reports often concern safety and health, housing and underpayment. In the popular press there is (almost) no awareness of the fact that there are different migration modalities, let alone that these are governed by different legal regimes.⁸⁵ At the same time, the reported cases show that intermediaries/service providers have nevertheless discovered the legal possibility to hire people in the cheapest and/or easiest way. When, for example, a TWA recruits Polish workers for jobs in Sweden, the actual circumstances may not change

Nazaire, media case no 15, court case no 24; Italy: East Lindsey media case no. 11, court case no 32; Luxembourg, court case no 36; Sweden: Termostav-Mraz media case no 37, Preemraff, media case no 38, Rimec, court case no 38, Laval court case no 39, UK: East Lindsey media case no 40, Tyne Tunnel, media case no 41.

⁸⁰ Belgium shippers court cases no 2 and 4; France EasyJet media case no 14, Ryan Air, media case no 15; Italy Arenajobs media case no 22; Luxembourg Kralowetz media case no 24; the Netherlands: Strikes, media case no 29: Hazeldonk incident and Mooy case.

⁸¹ Belgium: Mushroom cultivation, media case no 3; agriculture B 2006/2010 cases – special socsec seasonal work... Denmark: court case no 13; France, court case no. 19; the Netherlands: Abuses in agriculture, media case no 26, strikes, lettuce farm media case no 29 – a special site of the trade union http://www.fnvbondgenoten.nl/mijnbranche/branches/agrarisch_groen/nieuws/241975_celstraf_voor_uitbui ten/ warns about illegal use of Polish workers in large parts of the agriculture sector, notably mushroom cultivation. Sweden: Berry pickers, media case no 35,

⁸² Germany media case no 19; Italy: media case no 23.

⁸³ The Netherlands: media case no 27, Center Parcs Media case no 30

⁸⁴ Belgium: Struik media case no 1, La Corbeille media case no 2; France: apple juice company court case no 19; Germany: meatcutters media case no 18; UK: Kalwak court case no 40.

⁸⁵ The coverage of the Center Parcs media case no 30 in the Dutch media is a good example of this.

according to whether the TWA is Polish or Swedish,⁸⁶ but the legal situation does. This creates a clear incentive to look for the easiest and cheapest way (for the employer, the worker or both). Labour law is but one of the points to be taken into consideration; social security, tax law and migration being at least as important.⁸⁷ This is most evident during the transitional period in some Member States, when some of these modalities were open to new accession states, but the traditionally specific modality for worker mobility (the free movement of workers) was not (or still is not).

Denmark and Sweden (as well as the UK) are in a special position because of their autonomous collective system for establishing labour conditions (and in especially wage levels). This shaped the public debate on posting as well as the legal definition of the problem. The latter was formulated in terms of enforcing domestic collective agreements rather than the individual rights of posted workers. As a result, conflicts about the position of posted workers were often not labeled as such.

Genuine and not so genuine postings

In most Member States there is a presumption in law that all work within the territory will be governed by national law and/or collective agreements. This can be based on notions of public policy (e.g. B and FR), on the territorial organization of the social partners (SW, DK), on notions of equal treatment or a presumption of a close connection under private international law. In private international law this presumption can be rebutted in case of temporary posting, when the home state (of both worker and employer) retains a closer connection to the labour contract. The PWD also presupposes such a closer connection when it defines a posted worker as someone “who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works” (Article 2(1)). As discussed in section 3.2 above, implementation laws often do not contain a definition of posting. Yet contentious cases often relate to situations which are not deemed to be ‘proper’ posting because the worker does not normally work in another state than the host state, because the employer is not genuinely established in another state or because an employment relationship between employer and worker is missing. The Lindsey Oil Refinery seems to be an exception in this regard. From the ACAS report we gather that there was no dispute about the genuine nature of the posting. The conflict pertained to the labour conditions offered to the posted workers and the effect on local employment opportunities of subcontracting to an Italian company.⁸⁸

Some cases relate to letter box companies opened only for the purpose of posting. The worker might actually be made to work under the direct supervision of the user

⁸⁶ Facts taken from the Swedish Skanska/Adecco case, media case no 39. Similarly when a Belgian mushroom cultivator uses Polish workers to harvest his mushrooms either as seasonal workers or as posted workers – compare media cases no 3.

⁸⁷ This is specifically mentioned in the Swedish and French reports.

⁸⁸ *Report of an Inquiry into the circumstances surrounding the Lindsey Oil Refinery Dispute*, conducted by the Advisory Conciliation and Arbitration Service (ACAS), published on 16 February 2009.

undertaking, thus creating a situation of bogus subcontracting or illicit provision of manpower. The absence of genuine activities in the country of origin may be combined with repeated postings, in which the ‘posted’ worker is working in a specific Member State on an (almost) permanent basis. Other cases might describe situations of rotational posting in which the worker is posted consecutively to different Member States. An extreme example of such repeated or rotational posting is given in the Swedish report. The case was brought to light in a joint investigation into the granting of E 101 certificates for some 240 Polish workers who were said to be posted to work in a large infrastructure project by temporary work agencies established in Ireland and the UK.⁸⁹ In the Irish case 93 workers were granted Irish E 101 certificates stating that they should continue to be covered by Irish social security. The Swedish Social Insurance Agency discovered that 45 of them had earlier been posted from Poland to work for the same Swedish company. However, according to the certificates from Ireland they had been living in Ireland for approximately two months before subsequently being posted to Sweden. Strange to relate, 38 of them had moved to Ireland during the same period they had been working in Sweden as posted from Poland. Another conspicuous fact was that the 93 workers were residing at only six addresses in Ireland – 46 of them at one single address, which was not an apartment block. The course of action was the same in the British case. The Swedish authorities thus concluded that the workers had in fact never lived or worked in the countries stated and called the certificates into question before the Irish and British authorities. By the time that they had managed to establish contacts with the British and Irish authorities, some of the workers concerned had already received new E 101 forms from Cyprus. It is obvious that in these situations the worker cannot be deemed to ‘normally work’ in the country where his employer is established.

The provision of manpower through TWAs or subcontracting poses special problems in this regard. Undertakings may outsource their manpower to companies (sometimes subsidiary companies especially established for the occasion) in other Member States, employ TWAs or use (bogus) subcontracting. An example of how this works is the proposal (which in the end was not followed through) of Adecco Sweden to dismiss a group of Polish workers who were posted to the Swedish construction company Skanska and rehire them through a Polish subsidiary. Some read the Swedish Laval case as a case of ‘reflagging’ the manpower division of a domestic enterprise.⁹⁰ It is not only the new Member States that feature in the list of ‘flags of convenience’. Interestingly, Luxembourg features as sending state in several such reflagging cases, the Kralowetz case being the most prominent.⁹¹ The report of this incident on EIROOnline summarizes the case in the following terms: “In January 2002, a major scandal broke over the alleged illegal employment of drivers from central and eastern European countries by Kralowetz, an international road haulage company with its registered office in Luxembourg. The

⁸⁹ The Swedish report refers to: Kontroll av socialförsäkringstillhörighet vid utsändning till Sverige
Gemensam rapport av arbetsgrupp inom Skatteverket, Skattekontor 1 i Södra regionen och
Försäkringskassan, Projekt EU-kontroll.

⁹⁰ The term reflagging is derived from international shipping. It refers to the situation where a shipowner changes the flag of his ship to profit from a more favourable legal regime in the country of the new flag. Lower labour standards are an important incentive for reflagging, as are taxation and manning requirements.

⁹¹ <http://www.eurofound.europa.eu/eiro/2002/02/feature/lu0202104f.htm>.

affair has uncovered serious shortcomings in Luxembourg's system for monitoring international transport companies registered there, and has caused a major political controversy.” But international transport by road is not the only sector in which such reflagging takes place.⁹² A representative of the French employers’ organization in the TWA sector, PRISME, pointed out that many temporary agencies relocate to Luxembourg,⁹³ where social security contributions represent 15% of gross salary (against 40-50% in France).

The Netherlands is the sending state in several contentious cases in Belgium regarding Polish temporary agency workers. Without doubt the most contentious case was the “Struik Foods” case in 2005. In the food-processing undertaking Struik Foods, the trade union representatives called a strike because of the dismissal of Belgian workers, which was followed by a contract with a Dutch “posting agency” Covebo, which posted a considerable number of German-Polish workers to Struik Foods. The Polish workers were paid on average € 10 per hour less than the company’s Belgian workers.⁹⁴ In the same year and also in the food industry, a vegetable-processing undertaking La Corbeille received media attention after the trade unions discovered irregularities with Polish workers sent over by Dutch temporary work agency. In this case food safety was also called into question as the posted Polish workers did not speak Dutch and there were doubts whether they could follow all the instructions related to hygiene and safety.⁹⁵

The UK and Ireland, too, appear in the overview of cases as the ‘sending’ states of Polish TWA workers. A conspicuous example has already been described in a previous section. In a case currently pending before the Swedish Labour court, the Building Workers’ union is claiming nearly SEK 200 000 (approximately € 20,000) each for 36 Polish workers posted by Rimec, a temporary work agency established in Cyprus with an Irish mother company.

Use and abuse

There is clear concern about abuses of the freedoms granted by the EU internal market. Especially in the area of provision of manpower, the problem of combating illegal activities is encountered in almost all reports. Sometimes intermediaries in other Member States are used with the sole purpose of turning (temporary or seasonal) migration into posting. Besides this, provision of manpower is quite often associated with illegal

⁹² The French report mentions a 2010 case concerning subcontracting in France by a Luxembourg firm using Latvian workers. The Belgium report mentions “Rb. Antwerpen, 21 May 2008” in which case a Belgian shipping company had a branch establishment in Luxembourg where it recruited Polish and Slovak sailors who were posted to Belgium under a subcontracting relationship.

⁹³ Although the directors often are (and remain) French nationals.

⁹⁴ Het Nieuwsblad, “Arbeidsinspectie valt binnen bij Struik Foods”, 21/10/2005; Het Nieuwsblad, “Directie Struik Foods voelt zich bedrogen”, 22/10/2005 and Trends, “Staking bij Struik Foods”, 27/10/2005. Actuele vragen van de heren Filip Dewinter en Jan Lauryss aan Frank Vandenbroucke, Vlaams minister van Werk, Onderwijs en Vorming, Handelingen Plenaire Vergadering Vlaams Parlement, 26 oktober 2005, <http://www.vlaamsparlement.be/Proteus5/showJournaalLijn.action?id=416689>.

⁹⁵ De Standaard, “Polen werken meer voor minder geld bij La Corbeille”, 25/10/2005.

operations and undeclared work.⁹⁶ In extreme cases this may lead to forms of modern slavery and/or trafficking in human beings.⁹⁷ The risk of abuse seems to increase if the worker is in an illegal position him- or herself, e.g. for violation of the transitional migration regime. Several experts report exploitative practices such as the taking of passports, overcharging for housing, transportation and other services, the imposition of fines, etc. However, these forms of abuse are not specific to posting (nor for provision of manpower). The illegal temporary work agencies may be established both in the country of recruitment (leading to posting) or in the country of work (leading to migration). Several reported cases of abuse concerned migrant workers or even (bogus) self-employed. These cases involve social dumping in its purest form – with no respect for either the protective system of the country of origin or that of the host country.

A different situation arises when the employment conditions do conform to the standards of the home state but not those of the host. Several reports commented that in such cases the workers may not have any incentive to claim the extra rights awarded to them under the law of the host state. They are happy with the job opportunity and quite content with their salaries (see also section 4.5 on legal remedies). The harm is (felt to be) done to third parties, and – more abstractly – to the social structure of the host state, rather than to one of the parties to the individual contract. In extreme cases the workers will even operate in cohort with the employer to evade the law of the host state.⁹⁸ In those cases the law of the host state will only be enforced if enforcement is entrusted to host state authorities or interested third parties (such as social funds or the unions in the host state).

Union involvement

Apart from the practical help given by trade unions to individual posted workers (discussed below in chapter 4.5), they also use their collective tools to combat social dumping (and at the same time – although this may often not be the main goal – to protect posted workers' rights). These collective roles played by unions in disputes are often reported in the media. Several countries have witnessed collective action by or on behalf of posted workers.⁹⁹ In the Netherlands and France, the unions have been involved in several such labour disputes.¹⁰⁰ But non-unionized action has been taken, too.¹⁰¹ Wildcat strikes have caused considerable commotion in the UK, particularly in the so-

⁹⁶ Restrictions on the use of TWAs might be an explanation for the high incidence of irregular/undeclared work, but regulation does not itself explain underpayment and abuse.

⁹⁷ See Belgium media cases no 5 and 6; the Netherlands media case no 26; Sweden media cases 35 and 36.

⁹⁸ This was specifically mentioned by the Estonian expert.

⁹⁹ The Laval case is only the most notorious example (Sweden court case no 39). Collective action has also been reported in Denmark: Aarhus demonstration media case no 7; France: Saint Nazaire disputes media case no 11; Netherlands: media case no 29; UK: East Lindsey, Tyne Tunnel and Milford Haven, media cases no 40, 41 and 42.

¹⁰⁰ Netherlands: Strawberry pickers media case no 26; Strikes media case no 29 lettuce farm and Mooy case; France: Saint Nazaire media case no 11; France telecom media case no 13.

¹⁰¹ In the Netherlands for example the Hazeldonk incident, media case no 29.

called Lindsey Oil Dispute.¹⁰² In that case action was taken by local workers against a foreign undertaking suspected of circumventing the local CLA. Unions did not dare to get involved in that dispute for fear of being held liable under the Viking/Laval case law. Several authors have commented that this lack of union involvement exacerbated the conflict.¹⁰³

¹⁰² Media case no 40. See inter alia ACAS *Report of an Inquiry into the circumstances surrounding the Lindsey Oil Refinery Dispute*, 16 February 2009 and Novitz, Formula Working paper UK.

¹⁰³ UK report Ewing and Novitz, Formula Working paper UK.

3.6 ISSUES RELATED TO THE MATERIAL SCOPE OF THE PWD: RATES OF PAY AND WORKING TIME

Minimum rates of pay

The Directive includes in the hard nucleus of protection maximum work periods and minimum rest periods, minimum paid annual holidays and minimum rates of pay. These elements each have a distinct function in the overall protection of workers. However, they are closely correlated when considered from the perspective of fair competition. Especially when wages are calculated at the monthly or weekly rate, it is crucial to study how many hours a week/month the worker actually performs work in order to qualify for full pay. Likewise, holidays constitute direct wage costs and hence determine the actual cost per hour worked.¹⁰⁴

In this section we mainly look at the regulation of wages, but we also discuss some problems relating to working time and holidays.

In this regard, it is interesting to note that the Directive seems to employ two terms when referring to remuneration: in Article 3(1) the English language version uses the term ‘rates of pay’, whereas in Article 3(7) the term ‘minimum wage’ is used. In contrast, the Danish and Dutch language versions use identical terms for both (minimumlonen, mindsteløn).¹⁰⁵ Several other language versions use slightly different concepts in the two paragraphs.¹⁰⁶ It is unclear whether, in the context of the PWD, one has to distinguish between minimum wages and minimum rates of pay – the latter being a more extensive notion – or whether the two terms may be used interchangeably.

As mentioned, Article 3(1)(c) refers to “the minimum rates of pay, including overtime rates”. The first question to be asked here is what constitutes a minimum rate of pay? Article 3 contains some clarification in that para 1(c) includes overtime rates and excludes supplementary occupational retirement pension schemes from this notion, whereas paragraph 7 second sentence of the same article includes “allowances specific to the posting” in the notion of minimum wage, “unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.” Hence the Directive seems to impose some rules in this regard. However, the final sentence of paragraph 1 stipulates that the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c), is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

¹⁰⁴ Compare C-165/98 Mazzoleni para 39. “Second, in order to ensure that the protection enjoyed by employees in the Member State of establishment is equivalent, they must, in particular, take account of factors related to the *amount of remuneration and the work-period to which it relates* (emphasis added AH/MH), as well as the level of social security contributions and the impact of taxation.”

¹⁰⁵ Compare also the Czech version: minimální mzda; minimální mzdy

¹⁰⁶ DE: Mindestlohnsätze – Mindestlohn ; FR: taux de salaire minimal - salaire minimal; ES las cuantías de salario mínimo - del salario mínimo ; IT: tariffe minime salariali - salario minimo ; PT: Remunerações salariais mínimas; salário mínimo

Thus, a first assessment to be made concerns the way the minimum rates of pay are determined in the host state. Once the minimum rates are established we can take our analysis to step two and inquire into the way the actual wages paid to (posted) workers are compared to the minimum rates of the host state. Finally, Article 3(7) specifically allows for the application of terms and conditions of employment which are more favourable to workers and which are derived from the law applicable to their employment contract. Further on in this section we check whether Member States use a separate assessment for this comparison.

Standard setting

Statutory minimum wages exist in Estonia, Romania, France (SMIC), Luxembourg, Poland, the UK and the Netherlands. The minimum wage legislation usually establishes a single minimum for adult workers,¹⁰⁷ but may make special provision for young workers. However, even at this level a distinction may be made with regard to the worker's qualification. Luxembourg, for example, adds 20% to the minimum in the case of skilled work and Romania has a nationally applicable system of wage coefficients, which determine the relative wages of each wage group.¹⁰⁸

Collective agreements are the sole basis for setting wage levels in Belgium,¹⁰⁹ Denmark, Germany, Italy and Sweden. They form an additional source of wage provisions (besides the statutory minimum) in the other countries.

Collective agreements as a rule contain wage structures which are more complex than those found in the statutory minimum wages acts. The Belgian collective agreement for the construction sector, for example, contains six wage groups for work at different levels of qualification. The Italian and Luxembourg CLA's for the construction industry distinguishes seven wage groups and the Dutch CLA five.¹¹⁰ Within each group, there might be a set of scales that depend on seniority.

A first question to be asked would be whether these all could constitute a 'minimum rate of pay' (provided the CLA were to be generally binding). In line with their national tradition, which is strongly focused on preventing wage competition (an explicit goal of the Dutch Act on extension of CLA's), the Dutch stakeholders advocate a wide interpretation of what constitutes a 'minimum rate of pay': not only the statutory

¹⁰⁷ The age at which the worker is entitled to a full minimum wage may differ between the Member States. For instance, this would be 23 in the Netherlands and 22 in the UK.

¹⁰⁸ These coefficients (which are contained in a generally binding national CLA) also apply when the basic wage is not the national minimum wage, but is agreed at a higher level within a specific company. For example: skilled workers should be paid at 1.2 x the minimum rate, staff in positions that require a higher education 2.0 x the minimum rate.

¹⁰⁹ There is a fallback provision in case the social partners do not reach agreement – in which case minimum levels can be set by the government.

¹¹⁰ These are for work performed on-site – supervisory, technical and administrative staff are classified in one of 25 'job ladders'.

minimum wage but the entire wage structure in sectoral collective agreements is made generally binding and applied to posted workers. Also in line with their national tradition, which is much more tolerant of wage competition, the German authorities are more reluctant on this point. In the statute that regulates the protection of posted workers (Arbeitnehmerentsendegesetz - AEntG), Germany has created a special procedure for declaring the minimum rates of pay included in CLA's to be generally binding and a minimum wage CLA for the construction sector was established on this basis. However, this special CLA only contains wages for the lowest two wage groups from the general CLA for the sector, which itself contains six wage groups. And apparently a debate is going on to reduce the protection offered to posted workers to the lowest wage group only.¹¹¹

So the exact definition of 'minimum rates of pay' is interpreted differently in the Member States in case:

- Minimum rates are set at different levels e.g. in statutes as well as in collective agreements.
- A single instrument contains several minimum rates for different groups of workers.

From one point of view, these different national interpretations should be permitted since they may be assessed as a logical – and inevitable – consequence of the fact that the concept of minimum rates of pay in Article 3(1) (c) is to be defined by the national law and/or practice of the Member State to whose territory the worker is posted, as is stipulated in the last sentence of this provision. Another point of view, however, was fuelled by the *Laval* judgment in which the ECJ remarked that the protection offered by the Swedish system of decentralized negotiations could not be imposed on foreign service providers, inter alia because the protection thus guaranteed went beyond the (statutory) minimum.¹¹² Extrapolated to all systems of layered protection, these remarks may be read as an indication that only the lowest level of pay in every national labour law system can be enforced against foreign service providers, no matter how transparent, accessible and generally applicable the wage system may be.

In our view, such an interpretation would surely go too far since it would rob the Directive of much of its effectiveness with regard to offering adequate protection to workers as well as creating a level playing field for competition. This can be illustrated with some figures. The French statutory minimum wage is Euro 1343 a month for a full-time position. The regional collective agreement for the construction sector in the Basse Normandie region contains minima varying from Euro 1363 to Euro 1951 depending on wage group. In Luxembourg the 2010 statutory minimum wage for unskilled workers is set at Euro 1724.81 per month (which amounts to Euro 9.79 per hour on the basis of a standard working week), whereas the collective agreement for the construction sector has

¹¹¹ This is already the case for the newly acceded Eastern 'provinces' (Länder) which have separate wage levels from the older Western 'provinces' of the federal republic.

¹¹² C-341/05, *Laval un Partneri*, ECJ 18 December 2007, *ECR* p. I-11767, para 70. In the case of Sweden another problem (see *Laval*, para 110) noted by the ECJ was the non-transparency of such a system of wage bargaining.

seven scales running from Euro 10.15 to Euro 17.41 per hour.¹¹³ In the UK the national minimum wage as of 1 October 2010 is £5.93 per hour for those aged 22 or above. The NAECI agreement, a generally applied agreement in the construction sector, contains a basic rate of £8.10 an hour for a grade 1 adult rising to £13.54 for a grade 6 adult. In the Netherlands the starting wage in the CLA for construction is approx 25% above the statutory minimum wage of € 1,416.00 per month,¹¹⁴ whereas the average wage level is twice that. For further comparison: the minimum wage per month in Poland is 1317 PLN (approx. Euro 336), and in Romania it is approx. Euro 150.

Rates of pay

An even thornier issue is which elements of workers' protection can constitute an element of the minimum 'rates of pay'. As stated above, the Directive refers for the concept of minimum rates of pay back to the national law and/or practice of the Member State to whose territory the worker is posted. These concepts and definitions may vary considerably. Countries like Estonia and Poland, which mainly apply statutory minimum wages to posted workers, do not seem to have much trouble defining the concept: it seems to be restricted to the minimum wage as such. However, the concept is interpreted much more broadly in the countries that apply (the wage provisions of) collective agreements to posted workers, such as Belgium, Luxembourg, France and the Netherlands. The Luxembourg labour code contains a concept of 'wages and salaries' which refers to overall employee compensation, including, apart from the rate of cash payment, other ancillary benefits such as bonuses, discounts, *free housing*¹¹⁵ and any other securities of a similar nature.¹¹⁶ In Belgium the pay to be taken into account includes all elements of the wage that are related to the normal labour activity and to which the worker is directly or indirectly entitled at the employer's expense. These could be in cash or in kind, fixed or variable, including premiums and benefits. However, overtime rates, compensation for dismissal, reimbursement of costs and trade union premiums are not included. In France, the pay to be taken into account includes basic salary, benefits in kind, productivity bonus and posting allowance but not reimbursements, overtime allowances, seniority and hardship allowances, 13th month, workers' participations and a holiday bonus, unless this last is payable per month worked. The UK Employment Rights Act Section also contains a very broad definition. Section 27 defines 'wages' as "any sums payable to the worker in connection with his employment", including such elements as fees, bonuses, commission and holiday pay, as well as sick pay, maternity and paternity pay, but excluding inter alia restitution of costs, pensions and redundancy payments.

¹¹³ The statutory minimum wages is determined on a monthly basis; the wages in the CLA are calculated by the hour.

¹¹⁴ Wage level as of 1 Juli 2010 <http://www.rijksoverheid.nl/onderwerpen/minimumloon/vraag-en-antwoord/hoe-hoog-is-het-minimumloon.html> . There is no minimum hourly rate in the Netherlands.

¹¹⁵ See in this respect Article 3(7) second sentence PWD.

¹¹⁶ L 221-1 Code du Travail. However, not all benefits are taken into account when determining conformity with the minimum wage provisions. Only such benefits as conform to the requirements of fixity, regularity and generality.

In Germany the minimum pay in construction consists of the basic pay plus the special bonus for the construction sector. Italy has several concepts of minimum pay, differentiating between the basic salary, the basic salary plus generally applicable extras (such as a Christmas bonus) and the full salary consisting of all different salary components. It is not entirely clear which one can actually be enforced against foreign services providers. To compare the remuneration actually paid to the required minimum standard, Italy applies an assessment of the overall payment under the contract and compares this to the overall payment due under the CLA. Included in the equation are the basic wage and all contractually provided allowances and supplementary payments (first salary bonus, Christmas bonus). Not included are overtime allowances and allowances related to actual extra activities such as hazardous work. The Dutch collective agreements for the construction sector and for TWAs do not contain a definition of rates of pay, but do contain a list specifying the provisions of the CLA that apply to posted workers. All in all, about half the provisions of the CLA for the construction sector apply to posted workers, leading to a cost difference between posted and domestic workers of about 25%.¹¹⁷

In the wake of the Viking and Laval cases, Sweden and Denmark have amended their systems of autonomous norm setting in order to provide a more transparent and general system of establishing the rates of pay to be applied by undertakings posting workers to their respective territories. Part of the system in Sweden, which is still being set up, involves the identification of those elements in collective agreements that can be included in the concept of ‘minimum rates of pay’. Likewise, in Denmark the definition of ‘rates of pay’ is left to the social partners who are after all solely responsible for establishing wage levels. The Danish concept seems to be rather wide, if the collective agreement between 3F (a workers’ organization) and Dansk Byggeri (an employers’ organization) is any indication. This agreement contains special provisions for foreign services providers. The posting undertaking has to pay a set amount per posted worker per time unit into a special account to cover obligations regarding holiday pay, pensions, contributions to the maternity pay fund and pay for statutory holidays. The inclusion of pensions in this instrument can only be explained in terms of an extensive interpretation of the provisions of Article 3(1).¹¹⁸ The same seems to be true of Belgium, which imposes contributions to a fund that provides additional compensation in case of incapacity to work and early retirement.

An even more extensive notion of ‘wage’ is employed in the context of public procurement in Poland. In a Tripartite Commission for Social Dialogue, employers’ and employees’ representatives have agreed on the so-called ‘minimal cost estimate wage’.

¹¹⁷ These figures were mentioned by a spokesperson for the relevant union (FNV Bouw).

¹¹⁸ The UK NAECI agreement also seems to have broad coverage. Compare also the Danish Arbitration case described below: Arbitration tribunal’s order of 26 February 2010 in industrial arbitration case FV2009.0093, CO-industri for Fagligt Fælles Forbund, Dansk Metal and Blik- og Rørarbejderforbundet v DI-Organisation for erhvervslivet for Hammersen Elementbau & Co GmbH, Osnabück, Germany, Interzeit GmbH, Arnberg, Germany, Claanbau Brandschutzanlagen GmbH, Hamburg, Germany and Karl Dungs A/S, Hedensted, Denmark. Available on the Danish labour court’s home page, <http://www.arbejdsretten.dk/generelt/arbejdsretlige-afgoerelser/faglige-voldgiftsretter/2010.aspx>

This calculus is based on the minimal wage in effect in Poland, then adds taxes, social security payments, contributions to social funds and basic costs of health and safety. The minimal cost estimate wage is used to determine whether offers made in public procurement are ‘grossly low’. If the employer bases his tender on a lower price, it is presumed that he is not paying for something and the offer should not be accepted.

An interesting question in this regard would be whether Member States are entirely free in the way they define ‘rates of pay’. Though in the case of *Commission v. Germany* (C-341/02) described below, the overtime charges are excluded from the wage comparison, they explicitly form part of the ‘minimum rates of pay’ to be applied to posted workers. On the other hand, contributions to supplementary pension schemes are specifically excluded from the minimum rates of pay that may be imposed on foreign service providers. Likewise, the special areas of protection mentioned in Article 3(1) under (a), (b) and (d) to (g) seem – for that very reason – to be excluded from the concept of rates of pay in Article 3(1) under (c). This would mean that safety and health provisions, working time and holiday entitlements,¹¹⁹ maternity leave and protection against discrimination cannot be included in the notion of pay – even when these rights have cost consequences.

The Directive, in the interpretation given by the ECJ in inter alia *Commission v. Luxembourg* (C-319/06), limits the protection to be given to workers on the basis of host state provisions to the hard nucleus of Article 3(1) plus public policy provisions.¹²⁰ This means that rights that cannot be subsumed under one of the other headings (e.g. all kinds of special leave) can only be enforced against foreign service providers if they either are public policy provisions or can be subsumed under the heading of ‘rates of pay’. Hence, the exact definition of ‘rates of pay’ will impact directly on the effectiveness of the Directive both in ensuring protection of posted workers and in establishing a level playing field in the area of cross-border services.

Comparing the minimum rates of the host state to the wages actually paid: Commission v. Germany (C-341/02)

It is important to realize that there are two distinct elements involved in the comparison of wages under the PWD: first (1) the minimum rate of pay of the host state has to be established and then (2) the actual wages paid by the foreign service providers are to be measured against the compulsory minimum.

This distinction can be illustrated by the case C-341/02 (*Commission v. Germany*). In Germany the minimum wage for the construction sector consists of a basic wage plus a construction bonus. When comparing the remuneration that was actually paid by the employer to this German minimum wage, the German authorities refused to take into

¹¹⁹ Holidays and working time bear a close relation to wages. In some cases these rights are even interchangeable – a worker may buy extra days off work, or exchange holidays over the statutory minimum for extra pay. When wages are calculated by the week or by month, the number of hours worked in that period directly determines the effective hourly wage.

¹²⁰ And the possibility to extend the rights of TWA workers.

account all types of remuneration paid by the employer except the basic wage and a construction bonus (when available). According to the Commission this was against EU law. According to the Commission, employers established in other Member States may be obliged, under the provisions applicable in those States, to provide other elements of remuneration in addition to the normal hourly pay. Under the German legislation, those elements cannot be taken into account for the purpose of calculating the minimum wage. The Commission contends that the failure to take account of those allowances and supplements results in higher wage costs for the foreign service provider than those which German employers are required to pay to their employees and that employers established in other Member States are thus impeded in offering their services in Germany. According to the ECJ, while it is true that the host Member State is allowed to determine the minimum rate of pay under the PWD, It nevertheless remains a fact that the host state cannot, in comparing that rate and the wages paid by employers established in other Member States, impose its own payment structure (para 18).

In this case the concept of minimum wage – as far as it is applicable to posted workers – was not at stake. The German law is clear on this issue: the applicable minimum wage consists of the basic pay plus construction bonus. However, one can read in the judgment that rules on additional bonuses for, inter alia, heavy work and additional working hours laid down in other collective agreements which were declared to be of universal application were also applicable to posted workers (para 11). The question was: should these bonuses, or similar ones provided under foreign law or in the contract with the foreign employer, be taken into account when comparing the wages actually paid to the minimum wage standard in the host country?

The ECJ established that the parties to the dispute agree that on the basis of Article 3(1)(c) and 3(7), second subparagraph, of the Directive, payment for overtime, contributions to supplementary occupational retirement pension schemes and the amounts paid in reimbursement for expenses actually incurred by reason of the posting and, finally, flat-rate sums calculated on a basis other than that of the hourly rate need not be taken into account. Whereas the first three elements are taken directly from the wording of the Directive, the last one is not. Nor is the element explained further. When Germany states that it will amend its policy to include “bonuses in respect of the 13th and 14th salary months as being constituent elements of the minimum wage, on condition that they are paid regularly, proportionately, effectively and irrevocably during the period for which the worker is posted to Germany and that they are made available to the worker on the date on which they are supposed to fall due,” the ECJ agrees with the Commission that that will ‘remove inconsistencies’ (para 31-32).¹²¹ Accordingly, we may assume that it would be contrary to the Directive if a Member State were not to include these payments in the comparison .

The remaining discussion between the parties concerned whether “the allowances and supplements paid by an employer which, according to the German Government, alter the balance between the service provided by the worker, on the one hand, and the

¹²¹ An unresolved issue is whether the special bonuses should fall due during the posting to Germany in order that it be taken into account for the comparison, or not.

consideration which he receives in return, on the other, have to be treated as constituent elements of the minimum wage.” At issue here, in particular, are “quality bonuses and bonuses for dirty, heavy or dangerous work.”¹²² According to the ECJ “Contrary to what the Commission submits, allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of the Member State to the territory of which the worker is posted, and which alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return, on the other, cannot under the provisions of Directive 96/71 be treated as being elements of that kind. It is entirely normal that, if an employer requires a worker to perform additional work or to work under particular conditions, compensation must be provided to the worker for that additional service without its being taken into account for the purpose of calculating the minimum wage.”¹²³

Two aspects are interesting in the EJC’s phrasing. First, it would seem that a *general* bonus must be included in the comparison for hazardous work attached to a specific job category, which is due regardless of special dangers associated with the performance of a specific task. Such a bonus would not differ from a general bonus for work on construction sites. According to this reasoning, *special* incentives and compensations given for extra work or extra risks are comparable to bonuses for extra work (overtime rates), which likewise are excluded. Second, the ECJ seems to base its reasoning in para 39 on the fact that the special allowances are not constituent elements of the minimum wage as defined by law or practice of the host state. If we try to extrapolate this remark beyond the specific German context of the case, some terminological confusion may arise. In Germany the special allowances were not part of the minimum *wage* as established by their special procedure of extending CLA’s. But does this mean that these allowances cannot form part of the minimum *rates of pay* either? In Germany (as well as in the Netherlands and Belgium) special allowances are contained in generally applicable CLA’s. The Netherlands and Belgium assume these allowances are applicable to foreign services providers as part of the minimum rates of pay – a distinct notion from the statutory minimum wage. The situation in these Member States seems to be characterized by the fact that the detailed systems of remuneration agreed in collective agreements, is made generally applicable almost in its entirety.¹²⁴ The Directive seems to cater for these differences by relaying the determination of what constitutes ‘minimum rates of pay’ to the individual Member States. However, this delegation to national law creates its own problems: when special bonuses and allowances are part of a wider concept of ‘minimum rates of pay’, should these special pay elements not also be taken into account when comparing the minimum rates of pay to the wages actually paid? And can one special benefit awarded by the rules of the host state be exchanged for another, different benefit under the home country rules?

¹²² Para 38.

¹²³ Para 39-40.

¹²⁴ In contrast, the wage structure was traditionally not declared generally applicable in Germany.

Method of comparison under Article 3(7)

Article 3(7) provides that “Paragraphs 1 to 6 shall not prevent *application* of terms and conditions of employment which are more favourable to workers (emphasis added).”¹²⁵ In the Laval and Rüffert judgments the ECJ made it clear that this provision only refers to the application of more favourable terms and conditions of employment according to the law applicable to the employment contract of the posted worker (or agreed voluntarily by the employer). Based on the legislative history of the PWD we support that reading.¹²⁶

The PWD gives no indication, however, of the level at which the comparison should be made. A similar discussion has arisen in the context of Article 6 Rome Convention (= Article 8 of the Rome I Regulation), which stipulates that a choice of the law by the parties to an individual contract of employment cannot deprive the employee of the protection offered by mandatory provisions of the law that would have applied in the absence of such choice of law. This provision also superposes two different laws, and orders a comparison between the two in the light of workers’ protection. Article 6 of the Rome Convention has sparked a debate on the standard of comparison: should each legal provision be compared on its own merits (e.g. redundancy pay being separate from terms of grace for dismissals)? Should provisions be grouped together into categories (e.g. dismissal being one group, holidays and other forms of regular leave another)? Or should systems be compared in general?

The comparison issue was addressed in particular in the legislative process leading to the recent amendment of the Swedish Posting of Workers Act. The new Section 5a states that industrial action to encourage adherence to a Swedish CLA may not be taken against a foreign service provider if the employer shows that the conditions applied to the posted workers are in all essentials at least as favourable as the conditions of the CLA. This comparison should be based on objective factors (rather than the workers’ subjective preferences). The conditions should be compared separately for each matter within the hard nucleus. This means that inferior conditions with regard to holiday pay cannot be compensated by higher general pay levels. However, when conditions are clearly linked – such as working time and pay – it might be appropriate to consider these in combination. In other cases, such as annual leave, regulations may differ without one being necessarily

¹²⁵ Compare to the much more specific link to who may apply what on top of Art. 3(1) in Art. 3(10): ‘This Directive shall not preclude the *application by Member States* to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of: terms and conditions of employment on matters *other than those referred to in the first subparagraph of paragraph 1*.’

¹²⁶ See Laval paras. 79-81. 120 Cf. Rüffert paras. 32-34.. Compare M.S. Houwerzijl, De Detacheringsrichtlijn (PhD Thesis), Universiteit van Tilburg 2005, p. 161 . See, more in detail, also S. Evju, Posting Past and Present The Posting of Workers Directive – Genesis and Current Contrasts, Formula WP May 2009, p. 32: ‘Initially it was clear from the wording of the proposed provision that it referred only to more favourable terms and conditions in a workers home state (under the law applicable to the contract of employment) [[D 2, Parliament, COM-93 – ctr WG 11 – Council 1994h). There is no indication that the change of wording was intended to fundamentally depart from this. On the contrary, the subsequent concern was how to compare and the Statement in the Council Minutes on pay comparison (231/96) must be understood to presuppose that it is more favourable terms in the State of “the law applicable” that should be the yardstick.’

more favourable than another. In that case, comparison may be more broadly-based and summary.¹²⁷

Such a mix of comparison methods is also found in other systems. Dutch internal labour law applies a provision-by-provision approach; in Dutch private international law comparison occurs at the level of specific topics, such as pay or dismissal; whereas the agreement between the Dutch and Belgian unions with regard to the comparability of the CLA's in the construction sector is based on an overall comparison of protection offered. In Belgium, overall comparability of protection seems to suffice for the enforcement authorities, whereas a more specific comparability seems to be required in case of contributions to schemes and funds (e.g. the system of loyalty stamps). Likewise the recognition scheme between holiday funds in Germany and the Netherlands came to an end when the Netherlands introduced the concept of a timesaving account (which covers more types of leave than the annual holiday). This seems to imply a one-on-one comparison in which a specific right is compared on its own merits. This way of comparing creates the risk of cherry picking, which is described in the Polish report (but which is also a familiar concept in private international law). Can a worker posted from Poland to the Netherlands rely on Dutch law for his basic hourly salary (which is considerably higher in the Netherlands) but on Polish law to calculate the overtime bonus (which is higher in Poland) and through this combination (Dutch wage level times Polish surplus) acquire a right to payment for the extra hours that was contemplated neither by Dutch nor Polish law? The Italian report mentions the problem of comparing bonuses: if one country has a Christmas bonus, whereas another has a holiday bonus, is the posted worker entitled to both?

In the *Mazzoleni* case (which predates the implementation of the PWD), the ECJ seems to advocate an overall comparison of protection.¹²⁸ In paragraph 35 the ECJ states that “The host Member State's objective of ensuring the same level of welfare protection for the employees of such service providers as that applicable in its territory to workers in the same sector may be regarded as attained if all the workers concerned enjoy an equivalent position overall in relation to remuneration, taxation and social security contributions in the host Member State and in the Member State of establishment.” Likewise in para 39 it is stipulated that “in order to ensure that the protection enjoyed by employees in the Member State of establishment is equivalent, they must, in particular, take account of factors related to the amount of remuneration and the work-period to which it relates, as well as the level of social security contributions and the impact of taxation.” However, in other court cases predating the PWD, in which the application of a specific benefit was at stake, the comparison seemed to be limited to the specific benefit.¹²⁹

¹²⁷ Prop.2009/10: 48, p. 58-59.

¹²⁸ *Mazzoleni* C-165/98 15 March 2001.

¹²⁹ *Arblade*, C-369/96 bad weather stamps and loyalty stamps, *Finalarte* C-49/98 holiday pay and holiday bonus.

Gross / net wages

The identification of the constituent elements of ‘rates of pay’ (and their comparison) is further obscured by the gross/net debate: should wages be compared before or after tax and deduction of social security premiums? With the exception of the judgment in *Mazzoleni* referred to above (which concerned ‘atypical’ facts), it is the gross wages that are relevant under the case law of the ECJ on posting of workers.¹³⁰ This means that social security contributions paid in the home state also have to be taken into account when comparing wage levels. This question is distinct from the question of whether certain insurances as are obligatory in the host state (e.g. as part of a collective agreement) can be considered part of the minimum rates of pay and hence be imposed on foreign providers. Nevertheless, the two problems are not entirely unrelated. Social protection is organized in a wide variety of ways: specific protection may be offered through contractual obligations, through statutory insurance covered by the EU regulation on social security, or by means of additional insurances and/or funds contained in collective agreements. This divergence may cause extra problems regarding the comparability of protection (see also section 3.7 on industrial accidents and maternity leave).

This issue can be illustrated by an industrial arbitration case brought by Dansk Industri (DI), an employer’s organization, on behalf of six German service providers, which had joined DI and were thus brought within the applicable scope of the collective agreement between Dansk Industri and CO-industri, an association of trade unions.¹³¹ The dispute involved the interpretation of certain provisions in a Protocol to the Collective Agreement between DI and CO-Industri, agreed in 1998, which concerned posted workers. One of the issues at stake was the fact that the German companies had sought to include the contributions to a German statutory pension scheme in the wages it paid to its workers for purposes of comparison with the wages required by the collective agreement, which included a collective pension scheme. The industrial tribunal held that the purpose of the collective agreement’s pay provisions was to ensure that social dumping does not occur when labour is used that is cheaper than labour covered by the collective agreement. Accordingly, there must be a comparison between what the German employer actually pays and what should be paid by the German employer under the collective agreement. Thus, the trade unions were not allowed to ignore statutory social contributions paid by the employer as these must be regarded as elements of pay for the relevant employees.

¹³⁰ Commission/Germany para 29, confirmed in e.g. *Laval* (C-341/05).

¹³¹ Arbitration tribunal’s order of 26 February 2010 in industrial arbitration case FV2009.0093, CO-industri for Fagligt Fælles Forbund, Dansk Metal and Blik- og Rørarbejderforbundet v DI-Organisation for erhvervslivet for Hammersen Elementbau & Co GmbH, Osnabück, Germany, Interzeit GmbH, Arnberg, Germany, Claanbau Brandschutzanlagen GmbH, Hambrug, Germany and Karl Dungs A/S, Hedensted, Denmark. Available on the Danish labour court’s home page, <http://www.arbejdsretten.dk/generelt/arbejdsretlige-afgoerelser/faglige-voldgiftsretter/2010.aspx>.

Working time and holidays

Working time and holidays are harmonized through the Working Time Directive.¹³² This directive lays down a set of rules on maximum hours of work and minimum rights with regard to time off and holidays. This seems to ensure a minimum level of protection throughout the EU. One would assume that this would prevent these issues from being a major point of discontent. The reality is different, however. The directive still allows for considerable differences in working time.

First, the Working Time Directive allows the possibility to opt out of the protection regarding the maximum hours worked per week – a possibility which is used in (and fiercely defended by) the UK.¹³³ In regard to the calculation of working time, this directive allows a calculation over a longer period of time, making it possible to work longer during the posting and to have that compensated upon return.¹³⁴

Moreover, in several Member States (especially the ‘old’ receiving states) it is not the provisions of the Working Time Directive (based on minimum harmonisation) which determine the working hours of local employees, but rather provisions in statutes and/or collective agreements on the length of the regular working week. These may be considerably less than the maximum permitted under the Directive. France offers the most evident example here, with a regular working week of 35 hours.

Likewise, the holiday rights differ considerably between the Member States. Whereas the Directive guarantees a four week holiday, the holiday awarded under national law and collective agreements may add up to 5-6 weeks in inter alia the UK, the Netherlands, France and Denmark. Moreover, national law may contain rules on public holidays, which are added to the basic annual holiday. For example, the UK has eight public holidays.

In this respect, Article 3(1) of the PWD only refers to: (a) maximum work periods and minimum rest periods; and (b) minimum paid annual holidays. This seems to refer to the matters covered by the Working Time Directive. However, law and practice in the Member States recognize additional rights with regard to holidays and other types of paid leave. Several states award the worker a holiday bonus – extra payment over and above the regular wage for the time taken off work. This wider interpretation of Article 3(1)(b) seems to be based on a shared understanding at the time the PWD was adopted.¹³⁵

¹³² Dir 2003/88 OJ L 299/9.

¹³³ Article 22(1).

¹³⁴ Article 16.

¹³⁵ According to the 1999 report (p. 7) of the ‘Working group’ composed at EC-level to support the Member States during their implementation process of the PWD, the Minutes of the Council on the occasion of the adoption of the PWD, state that Article 3(1)(b) and (c) cover national social fund benefit scheme contributions and benefits governed by collective agreements or legal provisions, provided that they do not come within the sphere of social security (Statement 7). Cited by M. Houwerzijl, *De Detacheringsrichtlijn*, 2005, p. 134.

Besides the rights guaranteed by the Working time directive, the Member States have created different types of special leave rights, such as maternity leave and personal leave for public duties, sickness in the family, adoption etc. It is questionable whether these rights would also be covered by the provisions of Article 3(1)(a) and (b), which refer to (a) maximum work periods and minimum rest periods and/or (b) minimum paid annual holidays. However, as discussed above, the right to be paid during these absences is sometimes considered to be an element of the rates of pay in Article 3(1)(c) (e.g. Denmark¹³⁶), whereas maternity leave is part of the protection offered to pregnant women and women who have recently given birth under Article 3(1)(f), see further below.

Some national experts (e.g. Romania, Belgium) comment that the rules on working time are difficult to enforce in practice. National working time regulations may lack an effective and reliable system for recording hours worked, making it difficult to enforce the relevant rules (this problem was reported inter alia by the Belgian expert). With regard to annual leave, the Belgian expert reports on the lack of comparability of the national regimes of paid leave which may make it difficult to apply the rules in practice. A problem that arises in regard to the practical enforcement of the rules is that paid leave is often taken in the home country, after the posting has ended. In Belgium this leads to a de facto non-application of the rules. In fact, this Belgian observation was confirmed in the Polish report, where the expert cites an employers' representative saying that it would not be appreciated if a posted worker were to claim leave during his posting. Countries in which annual leave is guaranteed through funds face different challenges (e.g. Denmark, Germany, Italy). Here, the problems are non-registration with the holiday fund (reported in Italy) and the issue of mutual recognition of different holiday schemes (which is discussed below).

Problems in applying the rules on rates of pay (including holiday funds)

As the national reports made evident, Member States that apply a complex wage structure to posted workers have problems applying and enforcing this in practice (e.g. the Netherlands, Belgium). It is often too complicated to classify workers according to their function and level of experience. Moreover, the authorities lack information on the workers' years of experience. Hence, in practice only the lowest steps on the wage scales seem to be respected by foreign service providers.

Particular problems arise when the protection of specific wage elements is regulated through funds. Generally, funds are more likely than individual workers to actually enforce the obligation placed on foreign services providers. However, funds only regulate specific elements of the total pay (or total protection – some funds also cover retirement schemes and pay during maternity leave). This causes problems of comparability and mutual recognition. A clear example of these problems is found in the relationship between the Netherlands and Germany. There used to be a system of mutual recognition

¹³⁶ Compare too the definition of wages in Section 27 of the UK Employment Rights Act discussed above.

for the holiday funds in the construction sector. However, the Dutch fund was recently ‘transformed’ into a timesaving system, which can be used for different purposes (holiday, sabbatical, parental leave, early retirement). This change led the German counterpart to withdraw the mutual recognition.

Another example of the problems caused by the lack of comparability is the Italian system of Casse Edili (construction workers’ welfare funds), which cover additional health insurance, medical services, as well as specific allowances and other special remuneration. Only a few other construction funds (namely those in France, Germany and Austria) have a similarly wide coverage and are hence involved in a system of mutual recognition. It is interesting to note that the only court case published in Italy that relates directly to posted workers was initiated by a service provider. It concerned compulsory registration with the construction fund under the law on public procurement of the autonomous province of Bolzano.¹³⁷ In this case the Italian court did not apply the Italian implementation law on posting of workers (D.lgs.72/00), but simply ignored it, considering it clearly in conflict with Article 49 EC because of the applicability of the entire system of Italian Labour Law to posted workers it provides. The Provincial Law provides for the annulment of a contract when the chosen contractor does not register employees in the local construction fund. This rule was opposed by an Austrian construction undertaking, which had been excluded from a public call for tenders. The Administrative Court analyzed all services provided by the fund and compared them with services already offered to posted Austrian workers. It then also considered the local rules and contrasted them with Article 49 EC, since the local fund provides workers with the same or similar services guaranteed under Austrian Law.

Problems may also arise in respect of special forms of remuneration. For example: to what extent should a per diem / flat rate compensation for working abroad be taken into account when calculating the wage? These problems are extended when such benefits have a net character, whereas wages are compared against gross rates. The Italian expert, for example, reports of the practice of paying relatively large components of the wages as ‘compensation for costs’.¹³⁸ These compensations may not be subject to tax and social security premiums, even when they do not conform to costs actually incurred.

A different kind of problem is caused by payment in kind and costs deducted from the wages actually paid to posted workers. Several experts report on practices of overcharging for housing, food and transportation.¹³⁹ In this respect, Article 3(7) second sentence of the PWD merits attention. According to this provision, allowances paid in reimbursement of expenditure for travel, board and lodging e.g., are not considered to be part of the minimum wage. However, the PWD does not make reimbursement of these costs compulsory. This may be adjudged a serious lacuna, since it facilitates abusive

¹³⁷ Consiglio di Stato, Sez. IV, 1 March 2006, n.928 (<http://www.giustizia-amministrativa.it/webcds/ElencoSentenze.asp>) confirming T.A.R Bolzano 19 April 2005, n.140 in *Massimario di giurisprudenza del lavoro* 2005, 658. The local rules are Articles 47 and 48 of the Provincial Law of the Province of Bolzano n.6/1998.

¹³⁸ This need not be illegal but could be officially facilitated by the tax system of the country of origin.

¹³⁹ See section 3.5 cases.

situations, as mentioned in the national reports and also blurs the distinction between the (theoretically) ‘passive mobility’ of a posted worker who only moves because his employer performs a cross-border service and the ‘active mobility’ of a migrant worker who enters the labour market of the host state in search of job opportunities. In the latter case it seems appropriate that costs of travel and lodging are at the worker’s expense; in the former case the costs are usually paid by the employer (cf. traditional expatriate arrangements and rules in migrant law, usually obliging the third country service provider to reimburse costs of travel and lodging to their posted workers).

The Polish report specifically draws attention to the interaction between minimum wage provisions, working time provisions and overtime rates. The PWD requires that a worker posted in the framework of the provision of services should be entitled to a minimum of employee rights afforded by the host state. Polish employees and trade unions demand in addition that employees should also have minimum rights arising under Polish labour law, even when they exceed the scope of minimum rights of the host state. This view is shared by the Polish Labour Inspectorate. It is opposed by Polish employers that post workers abroad and employers in host states. A particular example concerned additional payment for overtime work, which in Poland is higher than in other states of the European Union. This amounts to 50% for overtime on work days and 100% for overtime at night, on Sundays and holidays. According to the employers it should not be possible to demand the (higher) minimum wage of the host state, adopt the (shorter) working week of the host state and then apply the (higher) overtime rates of the home state over the host state basic wage. If the latter were to be permitted, the end result of wages due would be higher than under either home state or host state rules. As mentioned above, in private international law this effect of the combination of two legal systems in a single actual situation is called cherry picking (by those who oppose it).

Best practices in applying the rules on wages and working time

Identifying (inter alia) the rates of pay

In the Netherlands the social partners have taken up the challenge of identifying the relevant parts of their collective agreements. Both the CLA for the construction sector and the one applying to TWAs contain a special appendix stipulating which provisions apply or even which parts of applicable provisions are meant for posted workers. Sometimes the text of the applicable parts of the provisions is rewritten to adjust it to the posted workers’ situation (references to Dutch provisions and situations have been deleted). In addition, a special explanation is given of the job-related pay system and guaranteed gross wages. Both CLA’s devote special attention to (posted) temporary agency workers in the construction industry, since the sectoral social partners have agreed on a special regime for this category, which is also explicitly stated to be applicable to posted temporary agency workers in construction. A similar process of identification seems to be under way in Denmark and Sweden.

Comparison and mutual recognition

In several countries the authorities and/or the social partners have undertaken to ensure mutual recognition of standards.

The most far-reaching are the agreements between social partners in construction in the Netherlands and Belgium on overall comparability of their collective agreements. Most agreements between sectoral social partners in construction are more restricted in scope and concern specific benefits, mostly those that are administered by funds. The German ULAK /Soka-Bau, for example, has signed numerous agreements with counterparts in other countries, including Belgium, France and the Netherlands. The Dutch-German agreement has been terminated, however (as mentioned above), after a change to the Dutch system.¹⁴⁰ The Italian national body for the construction funds CNCE has mutual recognition agreements with the construction funds of France,¹⁴¹ Austria¹⁴² and Germany.¹⁴³

In Belgium the Labour Inspectorate has tried to obtain an overview of benefits in other Member States which are similar to the Belgian system of loyalty stamps and end-of-year bonuses. Their conclusion was that identical protection is available in Italy, the protection in Germany is similar, but France has no comparable system. There is a special agreement with the Netherlands which entails that Dutch employers do not have to pay contributions to the fund but should guarantee their workers a raise in pay equal to the Belgian benefit.

Adaptation and transformation of rights

The extended CLA for the TWA sector in the Netherlands contains a special chapter on international activities. This chapter contains modifications to the CLA for temporary agency workers who are not permanently resident in the Netherlands, special provisions for the recruitment of groups of temporary agency workers abroad by Dutch TWAs, and provisions with regard to posting of temporary agency workers by foreign TWA's under the Dutch implementation of the PWD. The first group is entitled to all CLA standards (although adapted to their specific situation); the second group is only entitled to these standards in the hard-core fields stipulated in PWD. For workers domiciled abroad the CLA allows the transformation of certain rights into regular pay as long as the overall value of the employment conditions is equal for both groups.

The Danish system has special arrangements for ensuring compliance with the rules on holiday pay for posted workers. An example of how holiday pay is covered in collective agreements with foreign service providers is 3F's collective agreement with one of the biggest employer organizations in the construction sector, Dansk Byggeri. According to this agreement, when a foreign service provider agrees to become a party to the collective agreement, special provisions are invoked concerning posted workers, including the

¹⁴⁰ The Dutch social partners are not happy with the termination and are examining ways to challenge this decision of the ULAK.

¹⁴¹ This fund is called the UCF CI-BTP.

¹⁴² The BUAK.

¹⁴³ SOKA Bau.

employer's obligation to pay into a special account for each worker a certain amount covering such items as holiday pay, pension, contributions to the Danish employers' maternity leave fund, and pay for statutory holidays. The amount in the special account is then paid out to each worker on completion of the work or at the earliest after one year's employment. The amounts can be set off against amounts that the employer can document as having been paid in the company's home country for the same benefits.

The example of the Polish rapporteur also fits in this context, as it concerns a practice regarding undertakings in the context of public procurement, which has been referred to above: in a Tripartite Commission for Social Dialogue, employers' and employees' representatives agreed on the so-called 'minimal cost estimate wage'. This calculus is based on the minimal wage in effect in Poland, and adds taxes, social security payments, contributions to social funds and basic costs of health and safety. The minimal cost estimate wage is used to determine whether offers made in public procurement are 'grossly low'. If the employer bases his tender on a lower price, it is assumed he is not paying for something and the offer should not be accepted. This procedure transforms workers' protection in a certain monetary value/wage equivalent, which makes workers' protection much easier to compare.

Similar provisions on the transformation of certain rights to wage equivalents seem to exist in Denmark. Under the new rules on posted workers, the pay conditions that justify resorting to industrial action against foreign service providers must be based on the obligations Danish employers have on the basis of the current collective agreement. Any obligations (such as holiday pay and maternity/paternity pay) will be convertible to a wage equivalent imposed on the foreign employer. However, it is crucial, if any industrial action against a foreign service provider is to be regarded as legal, that the foreign service provider is not disadvantaged compared to a Danish employer. When implementing the pay claims gained through industrial action, it is therefore necessary to take into account what the foreign service provider is obliged to pay additionally to a posted worker (such as whether pension contributions have been paid in the home country).¹⁴⁴ Contributions to trade union education funds etc. that will not benefit the posted worker will – in accordance with the same principle – not be included in a pay claim which is supported through industrial action against a foreign service provider.¹⁴⁵

¹⁴⁴ Arbitration tribunal's order of 26 February 2010 in industrial arbitration case FV2009.0093, CO-industri for Fagligt Fælles Forbund, Dansk Metal and Blik- og Rørarbejderforbundet v DI-Organisation for erhvervslivet for Hammersen Elementbau & Co GmbH, Osnabück, Germany, Interzeit GmbH, Arnberg, Germany, Claanbau Brandschutzanlagen GmbH, Hambrug, Germany and Karl Dungs A/S, Hedensted, Denmark. Available on the Danish labour court's home page, <http://www.arbejdsretten.dk/generelt/arbejdsretlige-afgoerelser/faglige-voldgiftsretter/2010.aspx>.

¹⁴⁵ Compare Martin Gräs Lind, Danish Formula paper. The legislative history of the 'Laval' amendment in Denmark can be found (in Danish) under document number FT 2008-09 L 36 jf at www.ft.dk

3.7 ISSUES RELATED TO THE MATERIAL SCOPE OF THE PWD: OTHER ELEMENTS OF THE MINIMUM PROTECTION AND ORDRE PUBLIC

Health, safety and hygiene at work

Introduction

As case overview shows, it is evident that health and safety pose a major concern in relation to posted workers. There is evidence of a clear increase in the risk of industrial accidents, partly due to the communication problems inherent to a multinational/multi-linguistic workforce and partly to the more vulnerable position of some groups of posted workers.¹⁴⁶ The complications caused by the fact that posting often involves the presence of workers from multiple employers on a single site may also contribute to this increased risk. This latter element was already acknowledged in the 1989 Directive, which contains a duty to cooperate for all employers who ‘share a workplace’.¹⁴⁷ The special directive on temporary or mobile construction sites further elaborates this duty for the construction sector.¹⁴⁸

In addition, most Member States have special rules on the responsibility for safety and health issues when use is made of TWAs. This special regime can again be attributed to the fact that for temporary agency workers, too, the employer is not the one who controls the safety conditions in the workplace. Directive 89/391 contains more general provisions for ‘employers’ on whose premises work is performed by workers from outside undertakings or other establishments of the same undertaking. According to Article 10 (2) and Article 12 (2), the undertaking responsible for the site should ensure that all workers on the site receive adequate information and instructions on the associated risks.

The special measures for mobile workplaces and TWAs demonstrate that occupational safety and health is to a large extent a matter of assessment of and protection against local risks posed by the specifics of the work and the work place. As such, it has a close link to the site or premises on which the work is actually performed. This leads to a strong territorial element in the regulation of occupational safety and health. The public law enforcement mechanisms which are generally attached to this type of regulation re-enforce their territorial character. The reports on the Member States examined in this study are unanimous in their conclusion that the safety and health regulations apply to all work performed within the territory. The PWD does not appear to have caused any change in this respect.

¹⁴⁶ In Denmark the reported incidence of industrial accidents is twice as high for posted workers as it is for domestic workers: Karsten Hønge, “Kronik: Kampen om arbejdspladserne”, *ErhvervsBladet*, 15 april 2008, 1, Section, page 2. See also section 3.5 on cases and section 4.5 on the non-use of legal remedies by posted workers.

¹⁴⁷ Dir 89/391 Article 6 para 4.

¹⁴⁸ Council Directive 92/57/EEC of 24 June 1992 concerning the implementation of minimum safety and health requirements at temporary or mobile construction sites (9).

Conversely, safety and health regulation may be limited to work within the territory and hence not always apply to work performed abroad. However, the national reports are not unequivocal on this point. In Estonia the rules on health, safety and hygiene at work are provided by the Occupation Health and Safety Act TTOS¹⁴⁹ and the Government's regulations, as well as the regulations of the Minister of Social Affairs, adopted on the basis of the TTOS.¹⁵⁰ In principle, all these norms are applicable to workers posted from Estonia, i.e. an employer is required to implement the TTOS and other acts, regardless of the work place. The situation is different in Romania. According to Article 47 of the Collective Labour Agreement at National Level 2007-2009, "posted workers maintain all rights they had at the date of the posting, except the ones on health and safety and hygiene at work. If at the posting location the equivalent rights have higher levels, the posted workers do benefit from those, or they receive other rights as well, as to fit the new work place". This is deemed to lead to non-application of the technical rules on safety and health in Romanian law to workers posted outside Romania. The Dutch Working Conditions Act (Arbeids-omstandighedenwet 1998) seems to contain a more general restriction. Under Article 2 (extension of applicability) the law on labour conditions and the regulations based thereon also apply to work performed within the Dutch exclusive economic zone, work performed partially or fully outside the Netherlands on board Dutch ships, and work performed partially or fully outside the Netherlands on board an aircraft for the benefit of a Dutch employer. It has been deduced from this provision that the law does not apply to work performed outside the Netherlands, except for the specific cases mentioned therein.

This would mean that with respect to safety and health, a worker posted from Romania and/or the Netherlands may not be covered by the rules of the home state, but only (if at all) by the rules of the host state. In such cases it can be argued that the PWD does not create an overlap of legal regimes (of both home state and host state) but rather avoids a lacuna in which neither the host state nor the home state take responsibility.

Structure of the health and safety regimes

The European health and safety regime is based on Framework Directive 89/391/EEC¹⁵¹ and consists of several ingredients, including:

- Safety requirements with regard to the workplace, to equipment and to personal protection;
- The right to leave the workplace in case of serious, imminent and unavoidable danger;

¹⁴⁹ *Töötervishoiu ja tööohutuse seadus*/Occupational Health and Safety Act, passed on 16 June 1999 – RT I 1999, 60, 616; 2009, 35, 232. The act is available in English at <<http://www.legaltext.ee/text/en/X30078K4.htm>>, 1 June 2010.

¹⁵⁰ For example, the Government regulations *Töökohale esitatavad töötervishoiu ja tööohutuse nõuded*/Occupational Health and Safety Requirements for Workplaces, passed on 14 June 2007 – RT I 2007, 42, 305; *Töövahendi kasutamise töötervishoiu ja tööohutuse nõuded*/Occupational Health and Safety Requirements for the Use of Work Equipment, passed on 11 January 2000 – RT I 2000, 4, 30; 2003, 89, 596; etc.

¹⁵¹ This framework directive further provides the base for directives on working time, special protection for young workers and female workers who are pregnant or have recently given birth.

- Rules with regard to a regular risk assessment and formulation of a prevention policy;
- Information and consultation of workers' representatives;
- Information and training of individual workers;
- Organizational rules with regard to a medical service/ safety and health officers;
- Additionally, the national systems may contain rules with regard to the civil liability for industrial accidents and occupational diseases, entitlements to additional benefits and/or compulsory insurances.

In Belgium, safety and health in the workplace is regulated in a collection of Royal Decrees which is referred to as the “Codex on the welfare of workers”.¹⁵² This Codex is fully applicable to posted workers. The different aspects that are arranged are the ‘general principles’ (e.g. measures relating to health supervision); the ‘organizational structures’ (e.g. the setting up of an Internal Service for Prevention and Protection at work) ; ‘workplaces’ (e.g. basic requirements for workplaces, comfort requirements, requirements for special workplaces); ‘environmental factors and physical agents’ (e.g. ventilation of the workplace, noise, optical radiation); ‘chemical, carcinogen, mutagen and biological agents’ (e.g. special rules concerning asbestos); ‘equipment’ (e.g. screens, sitting at work, lifting objects); ‘individual equipment’ (working clothes, personnel protection equipment) and, finally, ‘special categories of workers and work situations’ (protection of pregnant women, recent mothers, young people). However, civil liability for accidents at work and professional diseases is subject to an assessment of private international law and is the responsibility of the posted worker’s employer. As to the social security coverage of the costs, chapter 2 of Title II of Regulation 883/2004 applies.

In Denmark all the general standards in the Working Environment Act¹⁵³ as well as the more detailed minimum standards issued by the Ministry of Employment pursuant to the Act’s authorization provisions apply to the working conditions of posted workers. The Act also contains essentially all the organizational measures regarding workplace health, safety and hygiene, including the obligation to cooperate with inspectors and requirements for worker safety representatives and councils at the workplace. These also apply to posted workers. However, liability to pay compensation for injuries caused by work accidents or occupational diseases is the subject of the Industrial Accident Insurance Law, which the Danish Posted Workers Act does not include among the laws that apply to posted workers.

In France, the entire part IV of the French Code du travail (Health and Safety) is applicable to the undertaking posting its workers in France. However, the system is modified at certain points, in particular as regards the Health and Safety committee

¹⁵² A complete overview of all the Royal Decrees that form the “Codex on the welfare of workers” can be found on the website of the Federal Public Service Employment, Labour and Social Dialogue in Dutch and in French. See <http://www.meta.fgov.be/moduleDefault.aspx?id=1958#>

In the section of the website that is dedicated to posted workers, some essential elements (general responsibility of the employers, temporary or mobile workplaces) of this bulk of applicable legislation have been translated into English.

¹⁵³ Working Environment Act, Consolidated Act nr. 268, 18 March 2005; numerous amendments to the consolidated act have been adopted in 2006, 2007, 2008, 2009 and 2010.

(CHSCT), the rules on medical care and the rules on the procedure for reporting industrial accidents. As far as medical supervision is concerned, the Code contains a mutual recognition rule: if the employer of the posted worker is established in a European Member State, he can provide proof that the worker has already been subject, in the country of origin, to the medical controls justified by the risks to which he might be exposed (Article R.1262-10 *Code trav.*).

There are no specific provisions concerning liability in case of accident or occupational disease; in case of accident the posted worker remains under the protection of the social security scheme of the country of origin. However, Article R.1262-1 *Code trav.* introduces an additional financial benefit in case of industrial accidents or diseases, which is available to posted workers if the duration of their posting is longer than one month.

In Germany, safety and health is regulated in fourteen different laws and five regulations. All these apply to workers posted to Germany. However, an employer's civil liability for industrial accidents is specifically excluded. The related risk is covered by a specific statutory insurance which is deemed to be subjected to the EU Regulation on the coordination of social security.

In the Netherlands the rules on health, safety and hygiene at work can be found in the Working Conditions Act (*Arbo-wet 1998*). This Act is deemed to apply in full to all work performed in the Netherlands. The rule on the employer's civil liability for industrial accidents and occupational diseases, however, is part of the Civil Code. The Dutch Act implementing the PWD specifically provides for application of this provision to posted workers.

In Italy all provisions on health, safety and hygiene at work are applicable to posted workers and so they also bind the foreign undertaking. Rules are stated in the Consolidation Act on Safety at Work in which all previous complex provisions are collected.¹⁵⁴ The duties of the employer and his directors in this Act specify the general safety obligation imposed on the employer by Article 2087 of the Civil Code, according to which "carrying on its activity, the employer must adopt all measures that, in conformity with the speciality of the activity, with the experience and the technique, are necessary to grant physical integrity and moral personality of workers". Some of these obligations – such as the duty to perform a medical check on workers before putting them to work, and the duty to offer sufficient training – can be fulfilled in the country of origin before the posting. A system of mutual recognition applies (provided similar duties exist in the home country).

According to the social partners (both trade unions and employers' associations), there are problems with the enforcement of the safety rules in case of posting. They particularly mention the duty to give general instructions on safety (Article 37 Consolidated Act) as well as the special training of workers responsible for safety

154 D.Lgs. 9 April 2008, n.81 "Attuazione dell'articolo 1 della legge 3 agosto 2007, n.123 in materia di tutela della salute e sicurezza nei luoghi di lavoro", in G.U. 30 April 2008, n.108.

measures and mobile workplaces. The latter must attend special training courses and possess the qualifications and professional skills required by law.¹⁵⁵ It is reported that workers selected by undertakings established in Eastern European countries frequently do not possess these requirements and skills.

In Luxembourg the implementation measure declares to be applicable to posted workers (inter alia) the health and safety of employees at work in general, and more particularly the minimum health and safety provisions laid down by Grand Ducal regulation on the basis of Article L. 314-2.¹⁵⁶ Given the very general terms of the relevant provision one might suspect that the procedures for affiliation to an occupational health service, as well as compulsory medical examinations, are also applicable to posted workers. However, this is not the case in practice. According to a Medical Inspector of the Ministry of Health, contacted in this regard, sending companies are not subject to these obligations in Luxembourg. The ITM (the labour inspectorate), within the framework of its controls, may contact the Ministry's Division of Occupational Health (DST) so that its inspectors may verify that employees posted to a position of risk (mostly in the Construction Sector) have a statement of capacity for work. In this case, the DST will move on site during "punch operations" [*operations coup de poing*], and will question posted workers about the compulsory medical examinations. Based on their statements and the situation on site, the DST may then decide to ask the sending company to send the statement of capacity for work established in the country of origin. Since these statements are very simple documents, the DST does not require a translation. If there are doubts about the veracity of documents or if the medical examination dates back too far in time, the DST may require the sending company to subject its posted worker to a new medical examination from an occupational physician in Luxembourg, at the expense of the sending company.

From the overview above, it would seem that coordination problems are caused not so much by the safety precautions to be adopted on site, but rather by specific institutional and organizational requirements. These pertain to:

- Training certificates for all workers involved in dangerous work / construction and/or special training for workers entrusted with safety and health responsibilities. Example: a 16 day training course before commencement of activities is compulsory in Italy.
- Health certificates or compulsory medical checks before the commencement of work (such medical controls before commencement of activities exist in Italy and Luxembourg, compare also France) and periodic screening of workers.¹⁵⁷ These countries do have a system of mutual recognition as to these requirements, but this only helps in the (rare) cases that the country of origin has a comparable system of work-related health care.

¹⁵⁵ Article 32 Consolidated Act.

¹⁵⁶ Article L. 010-1 of the Labour Code.

¹⁵⁷ Health surveillance is mentioned in the framework directive. However, this can also be provided for through the national health services or similar institutions.

Coverage of the economic risks of the employee as regards accidents at work

Countries have different systems for covering the economic risks of industrial accidents. In several Member States, such as France, Germany and Luxembourg,¹⁵⁸ industrial accidents are covered by social insurance law (and hence by the European regulation coordinating the field of law), not by the PWD. German and Luxembourg law even specifically exclude any civil liability of employers and/or co-workers for accidents at work and occupational diseases. The Netherlands and Romania, on the other hand, consider civil liability to be included in the notion of safety and health. They apply their civil liability regime to posted workers. Finally, in Sweden the trade union confederations have argued that trade unions should be allowed to require that foreign employers apply the terms of certain insurances in the collective agreements, notably those on compensation for accidents at work and the occupational group life insurances, as these terms cover health, safety and hygiene at work.¹⁵⁹ However, the Government deemed that this would not be consistent with the ECJ's statements in the Laval judgment.

Protective measures aimed at special groups

The special protection given in the Member States to pregnant women or recent mothers, children and young people is largely based on EU Directives.¹⁶⁰ The directive on **pregnant women and recent mothers** contains several types of protection to be offered to this specific category of workers, including;

- Additional rules on safety and hygiene in the workplace with special regard to exposure to toxic substances and radiation (Article 3-6).
- Rules on night work (Article 7).
- The right to maternity leave (Article 8).
- Payment of and/or entitlement to an adequate allowance during maternity leave (Article 11 sub 2).
- Protection against dismissal (Article 10).
- Some countries have added to this list a specific prohibition on working during a limited period around the expected date of childbirth (e.g. Denmark, the Netherlands).

¹⁵⁸ Probably Denmark as well. Liability is not included in the protection under the PWD but arranged through an insurance scheme.

¹⁵⁹ Ahlberg, Swedish Formula paper para 4.1.1. An alternative classification would be to consider such insurances as part of the rates of pay.

¹⁶⁰ Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) – OJ L 348, 28 November 1992, pp. 1-8; and Directive 94/33/EC of 22 June 1994 on the protection of young people at work – OJ L 216, 20 August 1994, pp. 12-20).

- Other rights associated with this group of workers concern the right to return to the same or a similar job after the period of leave and/or continued seniority during leave (e.g. Luxembourg).¹⁶¹

Especially in Member States with fragmented labour laws (Estonia, the Netherlands, Germany) the different types of protection may be implemented in different acts. This may also lead to different classifications of the rules thus implemented. Special rules on health and safety may be enacted in the regular legislation on health and safety. This is the case in – for example – the Netherlands and Denmark and Sweden. Romania however, implemented these rules as part of the equal opportunities regulation, whereas Belgium has a special law on maternity protection. Likewise, maternity leave may be a separate category of leave (Sweden¹⁶²), may be covered by the working time provisions, be part of the equal treatment legislation (Denmark), or be part of the law of contracts. The right to payment during leave may be based on contract law (Denmark¹⁶³), collective agreement/insurance, social security (Luxembourg, Belgium, France), or a combination of these (the Netherlands, Germany, Sweden). Finally, the protection against dismissal may be considered to be a part of contract law, especially the law on dismissal – a subject that is otherwise not covered by the directive – or again it might be part of the law on equal opportunities/non-discrimination (Denmark).

These differences in classification of the protection may cause problems because some topics (e.g. safety and health) are covered by the PWD, whereas others (dismissal, social security) are not. With regard to the protection against dismissal, both the Dutch and the Luxembourg experts report on the problem that protection against dismissal of pregnant workers may or may not be covered by the PWD. In the Netherlands, pregnant posted workers are protected by Article 7: 670(2) of the Dutch Civil Code (*BW*). This Article contains a general prohibition of unilateral termination of the contract by the employer during pregnancy and maternity leave. However, the usual sanction that accompanies this provision for workers under Dutch law is not applicable, so it is not clear how a posted pregnant worker can actually enforce her right to protection against unlawful dismissal. Nevertheless, although this lack of clarity has provoked two academic articles, the discussion at the time of writing remains purely theoretical.¹⁶⁴ No posted worker has so far stood up to claim his or her rights, let alone a pregnant one.

The problematic interaction between social security, contract law and special protection seems to have more practical relevance in this respect. This can be illustrated by giving some detail on how the protection is organized in some of the Member States covered by this study.

¹⁶¹ These rights, which only become relevant after the worker returns from leave, are hardly ever relevant in practice, as the worker on pregnancy leave is likely to return to the country of origin.

¹⁶² The parental leave act encompasses the right to parental/maternal leave, as well as the right to an allowance during leave, protection against dismissal etc. Hence, this act seems to cover most aspects of the special protection. Only the safety measures are included in the regular health and safety regulations.

¹⁶³ Section 7 of the Salaried Employees' Act.

¹⁶⁴ See: Zie Nunes, 'De Wet Arbeidsvoorwaarden Grensoverschrijdende Arbeid: een (export) product apart', NIPR 2000, 4, p. 384. Vgl. A.A.H. van Hoek, 'Een schijnbaar simpel vraagje: zwangerschapsverlof in het IPR,' NIPR 2002, p. 296-300.

The mandatory period of leave in Belgium consists of a maximum of 6 weeks pre- and a maximum of 9 weeks post-natal leave. In total pregnant workers are entitled to 15 weeks of maternity-related leave.¹⁶⁵ The maternity benefit during the period of leave is a social security benefit that is subject to coordination by Regulation 883/2004. For posted workers, the social security legislation of the Member State where they habitually carry out their activities remains applicable, so the same holds for maternity benefits during the period of posting.

In Denmark the Equal Treatment Act,¹⁶⁶ which is applicable to posted workers, contains the rules on women's right to absence in connection with pregnancy and maternity. Under the Act a woman has a right to absence from work from four weeks before the expected time of birth. The woman has the obligatory duty to take maternity leave for two weeks following the birth. After the first two weeks the woman has a right to 44 weeks of leave with a possibility for a further extension of 14 weeks. In addition, Section 7 of the Salaried Employees' Act, which also applies to posted workers as provided by § 5 of the Posting Act, provides that a pregnant woman has a right to 50 per cent of their normal salary for 4 weeks before the expected birth and 14 weeks after the birth. If the woman becomes sick due to the pregnancy before the start of the maternity leave period, she will have a right to full pay during the period of illness.

According to Article L.1262-4 of the French *C.trav.*, legal provisions and generally binding collective agreements are applicable to posted workers with regard to maternity leave and general protection, paternity leave and days off for family events. Pregnant women are entitled to 16 weeks maternity leave (L.1225-17 *C.trav.*). The maximum daily allowance during maternity leave is 77.24 Euros as from 1st January 2010. To be entitled to this allowance, pregnant women must have worked at least 200 hours during the last 3 months or 90 days before they become pregnant, or they must have paid social contributions on a salary which is at least equal to 1015 times the minimum hourly wage during the past six months before they become pregnant. Some collective agreements provide that women are entitled to their salary during maternity leave but this was not the case in either the construction or the temporary work industry.

In any of these combinations (posting from Belgium to Denmark or vice versa, Belgium to France v.v. and France to Denmark v.v.) one may ask how many weeks of leave the posted worker is entitled to, who should pay her, and how much during this pay. When one country offers more weeks of leave than the other, Article 3 (7) PWD appears to allow the worker to make use of the better protection (provided both systems apply to the case). However, whether the worker will actually be able to take (prolonged) leave of absence will also depend on the question of how much she is paid during her leave.¹⁶⁷ When payment during leave depends on coverage under an insurance scheme, the posted worker might not be protected by the law of the host state (FR). The same could happen

¹⁶⁵ Labour Act of 16 March 1971 (*Arbeidswet van 16 maart 1971, B.S., 30 maart 1971*).

¹⁶⁶ Equal Treatment in Employment Act (*Ligebehandlingsloven*), nr. 734, 28 June 2006.

¹⁶⁷ Conversely, the costs of maternal leave for the employer will depend on both the length of the leave and the payment due during leave.

when payment is part of social security (as it is in Belgium). This could lead to a lack of effective protection. On the other hand, it could be seen to go beyond the purpose of the PWD to combine the longer length of leave from one country with the higher payment during leave of the other.

As a matter of fact, the national experts do not report any problems with regard to the interaction between the law of the contract, the rules on social security and the protection offered by the PWD. A positive explanation for this might be that the diverse ways in which the topic is regulated does not create difficulties: the PWD caters for them all. A more negative and in fact more plausible explanation would be that the problem is simply not high on the list of priorities of the national stakeholders, who seem to focus on wages and general health and safety issues. If the rules on pregnancy cause problems, they will be felt at the individual level and will most likely be rare anyway, since (1) the sectors which seem to use the most posted workers are male dominated (construction).¹⁶⁸ This is all the more true as (2) employees would probably return to their country of origin at the start of their pregnancy leave (or otherwise be recalled by the employer). This makes most of the special rights of pregnant workers almost impossible to enforce (as was reported from Luxembourg and the Netherlands, for instance). Accordingly, the problem will mainly arise in case of long-term posting to which the law of the country of origin nevertheless applies (based on a closer connection or even the choice of the parties). But in such cases the interaction between public law rules on health and safety, contractual rules on payment and leave and social security provisions may be extremely difficult to resolve.¹⁶⁹

No particular problems – in theory or practice – were reported with the **protection of minors**. The Luxembourg labour authority states that posting of young people 16-18 years of age does occur in practice, e.g. apprentices in the construction sector. In such cases, the Luxembourg law applies as regards special protection. The Polish expert reports that young people are most often employed during summer holidays to do seasonal jobs. Other reports confirm the applicability of the protection of the host state, but do not contain information on the factual occurrence of posting of minors.

Protection against discrimination

The protection against discrimination does not seem to play a major role in the protection of posted workers. The relevant national laws and regulations are largely based on the relevant EU directives on discrimination at work.

¹⁶⁸ This assumption is based on stakeholders' observations. In fact, it is impossible to say anything about the numbers of male and female posted workers, since no (adequate) statistics/figures are available due to a lack of registration and/or data research in most Member States.

¹⁶⁹ This is confirmed by experience as legal advisor of one of the experts. Compare also Van Hoek, een schijnbaar simpel vraagje: zwangerschapsverlof in het IPR and Zie Nunes, 'De Wet Arbeidsvoorwaarden Grensoverschrijdende Arbeid: een (export) product apart', NIPR 2000, 4, p. 384..

As far as predominantly sending states are concerned, it is interesting to note that in Romania the protection against discrimination does not extend to workers posted abroad. The law only ensures protection for discrimination occurring in Romania. There is no access to special complaint procedures for posted workers, nor does what occurs on the territory of another Member States lie within the competence of the CNCD. This is different in Estonia and Poland. In Estonia there are two acts that prohibit discrimination in labour relations: the Gender Equality Act¹⁷⁰ and the Equal Treatment Act.¹⁷¹ Regulation under these acts is based on the EU Directives.¹⁷² In principle, the protection against discrimination extends to workers posted abroad. The Polish stakeholders were of the opinion that the provisions against discrimination also relate to workers posted abroad and are in general observed in practice. However, there are no specific data on this issue.

The national reports of the other Member States included in this survey confirm the applicability of non-discrimination laws to posted workers. Some comment that the special procedures which are developed in this area are open to posted workers, too. In Belgium this would be the complaints procedure at the Centre for Equal Opportunities and the Fight against Racism. In Denmark the Board of Equal Treatment is involved. In Sweden workers who are victims of discrimination can complain (inter alia) to the Equality Ombudsman, free of charge. The option of complaining to the Equality Ombudsman is frequently used by immigrants in Sweden. It does not appear that any posted workers have used it in practice, though.

In the Netherlands, equal treatment of men and women and other provisions on non-discrimination are laid down in the Equal Treatment Act (Dutch abbreviation: *AWGB*) and in Article 646, 647, 648 book 7 of the Civil Code (*BW*). Important is that posted workers may not be treated unequally on grounds of nationality. Unequal treatment is only permitted when related to the specific employment situation that goes along with cross-border posting. The PWD and for the Netherlands the WAGA contain rules about such a specific situation, namely temporary employment in another Member State. There is no special protection against victimization for posted workers or access to special complaints procedures. However, they may have recourse to the Dutch Equal Treatment Commission for an opinion or advice about a specific situation concerning unequal treatment, free of charge. No use in practice by posted workers has been reported to date.

¹⁷⁰ *Soolise võrdõiguslikkuse seadus*/Gender Equality Act, passed on 7 April 2004 – RT 2004, 27, 181; 2008, 56, 315. The act entered into force on 1 May 2004 and is available in English at <<http://www.legaltext.ee/text/en/X80041K1.htm>>, 1 June 2010.

¹⁷¹ *Võrdse kohtlemise seadus*/Equal Treatment Act, passed on 11 December 2008 – RT I 2008, 56, 315; 2009, 11, 67. The act entered into force on 1 January 2009 and is available in English at <<http://www.legaltext.ee/text/en/XXXX006K1.htm>>, 1 June 2010.

¹⁷² Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin – OJ L 180, 19 July 2000, pp. 22-26; Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation – OJ L 303, 2 December 2000, pp. 16-22; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) – OJ L 204, 26 July 2006, pp. 23-36; etc.

Provision of manpower

The PWD contains two separate provisions regarding the activity of TWAs and the provision of manpower. Article 3(1d) stipulates that provisions regulating the activities of TWAs are part of the hard nucleus. Article 3(9) allows MS to extend the protection offered to temporary agency workers to create equal treatment.

With regard to Article 3(1d), as already mentioned earlier in this report (see section 3.3 on domestic limits to the different types of posting), several Member States have regulated the activities of TWAs and impose strict limits on the provision of manpower. These restrictions may consist of rules:

- Regulating the provision of temporary agency workers through a system of authorization, registration, licensing, certification etc. Such systems, either compulsory or adopted voluntarily within the sector, can be found in e.g. France, Sweden, Italy, the Netherlands and Luxembourg.
- Limiting the use of temporary agency workers in certain sectors (notably construction and transport by road, e.g. the Netherlands, and until recently Belgium and Germany).
- Limiting the use of TWA workers to specific situations, usually connected to a temporary increases in demand. This restriction can be found inter alia in Belgium, France, Italy and Luxembourg.

Pursuant to Article 4 of the Temporary agency work directive (2008/104) the Member States shall review any restrictions or prohibitions on the use of temporary agency work before 5 December 2011 in order to verify whether they are justified on the grounds mentioned in the Directive.¹⁷³

The extra protection offered under Article 3(9) PWD usually takes the form of the equal treatment principle under which the TWA worker has to be treated equally to a similar worker in the user enterprise. This principle is incorporated (albeit limited to a hard nucleus of protection) in Article 5 of the Temporary agency work directive. It is already applied (in full or to a limited extent) in France and Italy.

Besides rules regarding the restriction on the activities of TWAs or the (full) equal treatment of agency workers with local workers in the same job/circumstances, several Member States have specific rules in place for temporary agency work regarding the enforcement of working conditions and related social security contributions and taxes, such as systems for joint and several liability for occupational accidents and the payment of (minimum) wages.¹⁷⁴

¹⁷³ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work OJ L 327/5.

¹⁷⁴ See with regard to wage liability also section 4.4 and Houwerzijl/Peters, Liability in subcontracting processes in the European construction sector, European Foundation, Dublin 2008.

Extension of the protection under 3(10) – public policy

In its judgment in the *Commission v. Luxembourg* case of June 2008 the ECJ made it clear that any extension of the protection not envisaged under other headings of the directive has to be justified on the basis of public policy. It was also made clear that the notion of public policy has to be interpreted restrictively. This has encouraged several Member States to re-evaluate their systems (e.g. Luxembourg, Denmark, Sweden) in order to check for inconsistencies. The most notable example of this is Luxembourg, which has limited the application of its indexation clause for wages to minimum wages only.

This example draws attention to one of the problems regarding to the notion of ‘extension of protection’. Apparently, indexation of minimum wages is part of the rates of pay, one of the hard core conditions to be applied to posted workers. But as such its application is restricted to the indexation of the wage level that constitutes the going minimum. Indexation as such is neither hard core protection nor a public policy provision. Hence it can not be imposed on its own to apply to remuneration over and above the minimum level. Therefore, it becomes crucial to decide which worker protection rules can be subsumed under the hard core provisions. In the specific sections on the hard nucleus we already referred to the discussion *inter alia* with regard to the rates of pay, health and safety and protection related to pregnancy and childbirth. Is a compulsory insurance against industrial accidents extra protection under Article 3(10), part of health and safety or a constituent element of the ‘minimum rates of pay’? In the two latter cases, the application of this type of protection will not be notified under Article 3(10). In a similar vein, Sweden applies its national implementation of the directives on part-time and fixed-term work to workers posted to Sweden. This is not considered to be a matter of extension under Article 3(10) as the relevant provisions are assumed to be part of non-discrimination law. In contrast, France has notified the compulsory contributions to a paid holiday fund and a bad weather scheme in construction as falling under Article 3(10), apparently considering it to be a public policy extension, rather than an element of the rates of pay or an element of the right to paid holidays. However, the application of its rules on paternity leave and days off for family events were not reported as constituting an extension of protection for public policy reasons. This clearly demonstrates that the relevance of Article 3(10) for effective protection of posted workers is directly related to the (so far differing) national interpretations of the hard nucleus of protection under Article 3(1).

Not surprisingly, the Member States with an autonomous tradition of labour law (UK, Sweden, Denmark) extend the protection to include collective labour law, including the right to strike. In France the rights to individual and collective rights and liberties, including the right to strike, are considered to have a public policy character. Only Sweden has reported the application of part of the Co-Determination Act under Article 3(10).

Practices which seem inconsistent with the restrictive wording of Article 3(10) can still be encountered in several Member States. With regard to statutory protection, the UK and

Italy seem to overextend their protection by applying all labour provisions to posted workers.¹⁷⁵ In the UK this wide applicability is in practice mitigated by the fact that effective protection may depend on a period of qualification¹⁷⁶ – full protection only being granted after the employee has worked for a minimum period, which could be up to a year in some cases.¹⁷⁷ Likewise it is recognised by all stakeholders that the Belgian implementing act goes beyond the hard core. However, in this case too, there is a wide gap between theory and practice. As in Italy, the practical monitoring and enforcement of workers' protection in Belgium is broadly speaking restricted to the provisions on pay.

¹⁷⁵ There is some discussion of the interpretation of the relevant provision in Italian law. For the UK see inter alia C. Barnard, *The UK and Posted Workers*, ILJ 2009, p. 122 ff.

¹⁷⁶ In France too, protection may depend on a period of qualification.

¹⁷⁷ T. Novitz UK Formula paper p. 8.

CHAPTER 4. Enforcing rights conveyed by the PWD

4.1 INTRODUCTION

This chapter deals with problems in monitoring and enforcing rights conveyed by the PWD. The objective of this part of the research is to describe and analyze existing problems, difficulties and obstacles encountered by posted workers if they intend to enforce their rights stemming from the Directive, as well as the difficulties experienced by monitoring authorities in the host Member States when controlling compliance with working conditions under Article 3 (1) of the PWD and its enforcement in practice.

To this end, the different actors involved in enforcement – workers and/or their representatives, national authorities – are introduced first. In section 4.2 attention is paid to the actors that monitor compliance with the rights guaranteed by the Directive and the presence of posted workers within the territory. In section 4.3 we turn to the monitoring actors' responsibilities for providing information to the general public, together with the information requirements they impose on service providers and other actors involved. Section 4.4 pays specific attention to possible legal or self-regulatory preventive and/or repressive tools used for (furthering) compliance and enforcement. In particular this concerns joint and several liability for recipients (clients/main contractors/user companies) of a service carried out by posted workers, in order to prevent the non-payment of wages, social security contributions and fiscal charges by their employer. Next, section 4.5 examines the legal remedies available to posted workers and their representatives as well as any other means of support for posted workers. Section 4.6, the last part of the comparative analysis in this chapter, concerns the inspection and enforcement activities of the monitoring actors in practice. It deals with the frequency of workplace control, with the way labour and other inspectorates assess self-employed persons rendering services in the receiving Member State and how they verify whether an undertaking is properly established in the country of origin. The extent to which cross-border cooperation occurs and the recognition of foreign penalties/judgments is also looked at.

4.2 ACTORS INVOLVED

In all the Member States examined, with the exception of the United Kingdom, national authorities explicitly fulfill a monitoring and inspecting role in respect of posted workers. In most countries the social partners are also involved. They may play multiple roles, such as acting as advisers, representatives and providers of legal aid to individual members (see below under 4.5), or performing monitoring and compliance tasks alongside the local or national authorities. Below, we introduce the different actors involved (as liaison office and) in enforcement per country. A distinction is made between (A) actors involved in monitoring *the rights* guaranteed by the PWD and (B) actors involved in monitoring *the presence* of posted workers within the territory. Within these categories situations may be distinguished where no authority is involved, only one single authority, or where multiple authorities are involved.

The social partners seem to be involved in both categories, albeit more often informally than formally. With regard to category A, in all countries except Germany, it seems to be the case that no monitoring and enforcement competences are targeted specifically solely at the posting of workers. As a result, inspecting bodies act within their ordinary prerogatives, which means in practice that they essentially interpret existing national law following both “local practices” and domestic policy guidelines. By contrast, in regard to category B, which embodies a more ‘migrant law’-like competence (viz., access to the territory of a state), specific monitoring and enforcement tools targeted at the posting of workers do exist in several member states.

The last paragraph of this section looks at the role of decentral/local authorities. In fact, local actors seem to be involved only to a very minor extent. Not surprisingly, this is more often the case in larger and/or federal countries such as Germany and Italy than in smaller countries such as Luxembourg and Estonia.

The overview of national actors involved in monitoring and enforcement shows a rather heterogeneous picture, which may be assessed as less than ideal from the point of view of enhancing the free provision of services, as well as from the perspective of the other aims of the Directive, including the protection of the posted workers and sustaining fair competition. However, this situation reflects the choice in the PWD to leave monitoring and enforcement of the rights conveyed in the Directive fully to the national level (see Article 5 PWD), without any detailed requirements or guidelines (of minimum harmonization), as to the appointment of certain responsible actors and their tasks.

(A) Actors involved in monitoring the rights of posted workers

Involvement of public authorities

No authority?

As mentioned above, no central ‘Inspectorate’ in the United Kingdom is involved in guaranteeing posted workers’ rights in the country.¹ The appointed Posted Workers National Liaison Office used to be the Department of Trade and Industry, but this has nowadays been renamed the Department for Business Innovation & Skills (BIS) and indeed, nothing specifically related to the enforcement of posted workers’ rights can be found on its website. Nevertheless, if one tries to find information per subject matter, there seem to be authorities which at least could be expected to be involved in monitoring and enforcing posted workers’ rights, most notably the Health and Safety Executive (HSE), which monitors and enforces health & safety law. Since the laws enforced are deemed to be applicable to posted workers, this agency ought to be involved in guaranteeing the relevant H&S entitlements to posted workers.² With regard to temporary work agencies, too, it would make sense if monitoring, inspecting and enforcement tasks of the Employment Agency Standards (EAS), were also to cover foreign temporary agencies providing services in the UK (under art. 1(3)(d) of the PWD). However, this does not seem to be the case. Novitz observes that the list of statutory employment law provisions that apply to posted workers in the UK seems to be in excess of the prescriptions of Article 3(1) of the PWD, but the ‘Conduct Regulations’ is not on that list.³ The explanation may lie in the fact that the specific legislation (‘Conduct Regulations’) in this area only seems to apply to employment businesses⁴ established in the UK.⁵ Hence, it merits further study to establish whether the situation with respect to temporary agency regulation in the UK is one of too little implementation.

¹ Based on information from national report UK (K. Ewing) and the Formula working paper on the UK of T. Novitz, 2010.

² See for the way HSE interprets and formulates its competences and activities:
<http://www.hse.gov.uk/enforce/examples.htm>

³ See T. Novitz, Formula working paper September 2010, p. 7, based on archived content of the Department for Business, Innovation and Skills (BIS) website, in Britain, principal legislation relevant to the Directive is: the Working Time Regulations 1998; the National Minimum Wage Act and Regulations 1998; the Sex Discrimination Act 1975; the Race Relations Act 1976; the Disability Discrimination Act 1995; the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000; the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002; the Employment Equality (Sexual Orientation) Regulations 2003; the Employment Equality (Religion or Belief) Regulations 2003; health and safety legislation; legislation on the employment of children.

⁴ ‘Employment Businesses’ are suppliers of temporary/casual workers to third party hirers; whilst ‘Employment Agencies’ introduce workers to hirers for direct employment by the hirer, sometimes referred to as head-hunters. To the latter category, also the Employment Agencies Act 1973 applies.

⁵ According to a consultation and impact assessment report of March 2009, The Conduct of Employment Agencies and Employment Businesses Regulations 2003 sets minimum standards for employment agencies and employment businesses *operating from premises in Great Britain* (emphasis added), see <http://www.bis.gov.uk/files/file50425.pdf>, p. 6. See also the EIRO ‘Thematic feature – posted workers’ 2003, available at: <http://www.eurofound.europa.eu/eiro/2003/06/tfeature/uk0306106t.htm>. Here, the UK rules on TAW are only mentioned from the perspective of the UK as a sending state.

One single authority

In Denmark, Estonia, France, Luxembourg, the Netherlands, Poland, Sweden and Romania only one government authority is made responsible for the surveillance of posted workers' rights under the PWD.⁶

In Estonia, France, Luxembourg, the Netherlands,⁷ Poland and Romania, it is the Labour Inspectorate which exercises state supervision over fulfillment of the requirements provided under the applicable labour legislation. In all countries this relates most notably to health & safety law, but, depending on the system, other duties may include surveillance of other items under art. 3(1) PWD (for instance, the Minimum Wages Act in the Netherlands since 2007).

In Denmark and Sweden the situation is closely comparable, but here the authority is called the Work(ing) Environment Authority (WEA) and, as its name shows, it focuses on monitoring compliance with the rules on working environment health and safety. In Sweden, it was appointed as liaison office from the first day of the PWD's implementation, and as of June 2010, this body is also appointed as the Danish Liaison Office, replacing the Labour Market Authority.⁸ In the Swedish report, the Equality Ombudsman, which monitors compliance with the Discrimination Act, was also mentioned as a monitoring body. The Discrimination Act makes no distinction between posted workers and those who normally work in Sweden, so posted workers are within its scope. This may also be the case for several other countries mentioned above, but in practice the authorities concerning non-discrimination law do not seem to play a role in monitoring, let alone the enforcement of posted workers' rights.⁹

Multiple authorities

In Belgium, Germany and Italy, multiple authorities are responsible for the surveillance of posted workers' rights under the PWD.

In Belgium, different actors are entrusted with the monitoring of compliance with the rights guaranteed by art. 3 of the PWD, because the different subject matters contained in the hard nucleus relate to the competences of different authorities at the national and

⁶ In fact this is not fully true for Luxembourg, where besides the Labour and *Mines* Inspectorate [Inspection du travail et des Mines, ITM], the Customs and Excise Administration [Administration des Douanes et Accises], is also responsible for monitoring. Nevertheless, it seems as if the ITM possesses most, if not all, competences regarding the protection of posted workers' rights.

⁷ Neither the Labour Inspectorate nor any other organization is mentioned in the Dutch implementing Act WAGA. Only the Parliamentary documents make it clear that the Labour Inspectorate is to function as liaison office. The 'Rijksverkeer inspectie' is also mentioned in the Documents but this organization has only minor tasks in the enforcement of Dutch labour law. See Kamerstukken II, 1998-99, 26 524, nr. 6, p. 5.

⁸ The labour market authority possesses competences concern monitoring developments on the labour market in general, such as international recruitment issues and the active employment policy. The change may have been informed by the fact that the WEA has more direct contact with posted workers.

⁹ In the Netherlands, the CGB (Commissie Gelijke Behandeling), has issued two opinions on the request of Polish *migrant* workers (Oordeelnummer 2010-36 (unequal treatment of Polish seasonal workers regarding remuneration); Oordeelnummer 2004-81 (unjustified exemption of temporary Polish workers from pension rights)).

regional level. The two main inspecting bodies belong to the Federal Public Service (FPS) ‘Employment, Labour and Social Dialogue’, also appointed as liaison office under art. 4(1) of the PWD. FPS is the Belgian name for a Ministry (since 2000 ministries in Belgium were renamed ‘FPS’s). Within this federal ‘Ministry’ the Inspection of Social Laws (Inspectie Toezicht Sociale Wetten) is competent to monitor minimum wages, working hours and rest period, and protection of (future) mothers. A small network of specialized labour inspectors was created to deal with cross-border cases, called COVRON (Controle Vreemde Ondernemingen) within this Inspectorate. Another inspection body within the same ‘Ministry’ is the Inspection of Welfare (Inspectie Toezicht op het Welzijn), with competence regarding health and safety law matters in the workplace. As it is embedded in the Belgian social security system, the surveillance of compliance with paid holiday schemes belongs to the competence of the Social Inspection (Sociale Inspectie). This Inspectorate is part of the ‘FPS’ (Ministry) for Social Security. Regional inspection services in Flanders, Brussels-Capital and Wallonia are responsible for the control of legislation on the recognition of temporary work agencies or work permits.

Another multiple-actor situation exists in Italy, where the labour inspectorate is responsible for monitoring all working conditions and it is distributed throughout Italy by way of Provincial Labour Directorates (DPL). Each DPL acts within the coordination framework of Regional Labour Directorates (DRL). Provincial and Regional Labour Directorates are decentralized bodies of the Ministry of Labour, Health and Social Policies (DG Attività Ispettive: General Directorate for Inspective Activities), which promotes general coordination of all inspection activities at national level. Although Labor Inspection Authorities are national bodies, they work in different ways, depending on the Province or Region. The autonomous provinces of Trento and Bolzano have a special statute with independent competences concerning the regulation of the labour market, whereby they rule independent inspectorates. However, with regard to health & safety law, the ASLs (local health authorities) are also involved with their own inspectors (“servizio prevenzione e sicurezza”: “service of prevention and safety”). Provincial Labour Directorates (DPL) should inform ASLs in advance about their inspections, in order to avoid double control (Art. 13, D.lgs. 81/08). Controls on social security contributions belong to the competence of inspectors of Social Security Authorities (INAIL for public compulsory health and accident insurance, INPS for other social insurances). Provincial Labour Directorates are also responsible for the coordination and direction of those inspectors, in order to avoid double intervention and to establish uniform methodologies (Art. 5, D.lgs.124/04).

Last but not least, the division of competencies between monitoring authorities responsible for surveillance of posted workers’ entitlements in Germany is rather difficult for outsiders to understand, since it is quite dissimilar to that in the other Member States.

Compared to the other Member States, the involvement of the federal customs administration, is unique¹⁰: according to § 16 AEntG (Act on the posting of workers), the

¹⁰ Note that in Luxembourg the Customs and Excise Administration [Administration des Douanes et Accises], is partly responsible for monitoring, too.

customs administration (i.e. the Regional Finance Department Cologne, Finance Control Illicit Work (Oberfinanzdirektion Köln, Finanzkontrolle Schwarzarbeit)) is the body appointed to inspect whether the employer is in compliance with the obligation mentioned in § 8 AEntG (granting minimum employment conditions which are laid down in generally binding collective agreements).

On the other hand, the customs authorities have no competence to inspect compliance with obligations of “all employers with their base abroad, including but not restricted to those in the construction, commercial cleaning and mail services sectors,” who, pursuant to § 2 of the AEntG, must guarantee to provide the same employment conditions as those laid down in general in legal and administrative regulations in Germany, with which domestically based employers are consequently also required to comply.¹¹ So other authorities may be competent to monitor compliance with the minimum employment conditions not laid down in generally applicable CLAs. These are the ‘individual’ statutory regulations regarding the hard nucleus stated in Art. 3(1) PWD.¹² This, however, is without prejudice to competencies of the inspection authorities according to § 2 paragraph 1 no. 5 Schwarzbeitsbekämpfungsgesetz (SchwArbG, the Act on combating illicit employment) and other inspection competences of customs and other inspection authorities that enforce compliance with health and safety provisions and combating illegal employment. The main inspection body regarding undeclared work is the Regional Finance Department Cologne (Oberfinanzdirektion Köln). This authority is assisted in its tasks by a range of other authorities, among them several bodies involved in the application of labour market and social security/benefit regulation.¹³

From a comparative perspective, what is particularly striking is the absence of anything equivalent to a labour inspectorate or work environment authority with (at least) monitoring competences regarding health & safety law. This is because the German system for safety and health in the workplace has a dual structure, encompassing state (at Federal and Land level) safety and health provision and the autonomous accident insurance institutions. The state (at Federal and Land level) enacts legislation and promulgates regulations and the rules of state boards. After examining their needs, and with the approval of the Federal and Land governments, the accident insurance institutions publish their own accident prevention rules. The enforcement of occupational safety and health legislation in Germany was traditionally not very well coordinated. In response to this problem the stakeholder authorities agreed on a Joint German Health and

¹¹ Cited from the website

http://www.zoll.de/english_version/f0_aentg/a0_info_ag/d0_arbeitsbedingungen/index.html

¹² See http://www.zoll.de/d0_zoll_im_einsatz/b0_finanzkontrolle/e0_aentg/a0_info_ag/h0_regelungen_tarifvertraege/f0_rechts_und_verwaltungsvorschriften.pdf

¹³ Namely the Federal Employment Agency (Bundesagentur für Arbeit), the Social benefits agencies ((Sozialhilfeträger): the social benefits agencies within the meaning of § 28 paragraph 2 SGB I are urban municipalities and districts (kreisfreie Städte und Landkreise), the superior social benefits authorities and for particular tasks the health authorities (Gesundheitsämter), the Collecting office within the meaning of § 28 i SGB IV (generally the health insurance agencies (Krankenkassen)), Pension insurance agencies (Träger der Rentenversicherungen) (§§ 125 ff. SGB VI), and Accident insurance agencies (Träger der Unfallversicherungen) (generally the employers' liability insurance association (Berufsgenossenschaft)).

Safety Strategy (GDA).¹⁴ Hence, although the Federal State did regulate the minimum employment conditions mentioned in the AEntG and the MiArbG at federal level, which prevents the states (Länder) from regulating in these areas, the division of competences between the Federal State and the Länder may still cause problems with the enforcement of health & safety law on posted workers.

Social partner involvement

Formal: the Nordic countries

Monitoring compliance with other acts of labour legislation than health & safety, let alone collective agreements, has never been a task for public actors in Denmark and Sweden. This is left to the social partners and, in (the few cases where they are not organized), to individual workers or employers themselves. Hence, the Danish and Swedish¹⁵ trade unions are in practice the only actors that monitor compliance with the rules, apart from those covering working environment health and safety. Nevertheless, in both the Danish and Swedish situations doubts were raised about the possibility that trade unions can effectively monitor all posted workers. It was observed in the Danish report that to date only the trade unions in the construction sector have been able to monitor the working conditions of posted workers since these are the most visible and therefore easily detected. However, the trade unions do not have adequate resources to monitor all posted workers effectively. The Swedish report stressed that the trade unions' capability of seeing to it that posted workers are not deprived of their rights depends on whether or not their employer, or at least the main contractor, is bound by a CLA. Without a collective agreement, the trade unions have no means by which to exert pressure on the employer to account for pay rates etc.

Formal: other countries

In the Eastern European countries Estonia¹⁶ and Poland, the formal involvement of trade unions (and also of employees' representatives in Estonia) consists of their right to have recourse to the Labour Inspectorate in case an employer violates labour laws, an employment contract or collective agreement or other contracts regulating the interests of trade union members. In Estonia, a supervisory agency is required to reply to a written appeal from a trade union no later than within two weeks. In Poland, when the trade union considers that the conduct of a body of the state administration, a regional self-governing authority or an employer is not in conformity with the law or violates the principles of social justice, the trade union may make representations to the appropriate body with the request that the proven irregularities should be eliminated in accordance with the appropriate procedures. In the workplace, Polish trade unions run the social labour inspection (Act of 24th June 1983 on the social labour inspection). This is designed

¹⁴ See information on <http://osha.europa.eu/en/oshnetwork/focal-points/germany>.

¹⁵ Although in Sweden the Work Environment Authority monitors compliance with the Working Hours Act as well as the acts on working time for road transport work, for mobile workers in civil aviation and in international rail transport. However, in almost all sectors, the organisation of working time is regulated in collective agreements that replace the Working Hours Act, partly or entirely.

¹⁶ For details, see M. Muda, 'Estonia' in *The Laval and Viking Cases. Freedom of Services and Establishment v. Industrial Conflicts in the European Union*, eds. R. Blanpain and A. M. Świątkowski. Bulletin of Comparative Labour Relations, No 69, Kluwer Law International, 2009, pp. 38-42.

to ensure safe and hygienic work conditions in the workplace, and to protect workers' rights under labour law provisions.

Trade unions are also involved in enforcement tasks in the workplace in Italy: trade union representatives perform their ordinary tasks of monitoring and checking employment conditions in companies which employ more than 15 employees. They are called RSA (Article 19, Law 300/70) and, in the matter of health and safety at work, 'workers' health and safety representatives' (Articles 47-50, D.lgs. 81/08). These bodies cooperate with Labour Inspectorates, to which they report breaches of the law. In the building sector in particular, there is a continuing union practice of monitoring the employment conditions of posted workers. In this sector, which is mainly composed of small firms, local trade union representatives often enter construction sites and then notify Labour Inspectorates of possible irregularities.¹⁷

The Italian report reveals how enforcement at grassroots level may depend on local trade unions' initiatives: in Milan, an inspection unit was established within a local construction fund, with monitoring competence over foreign workers employed by contractors in the entire Province. Its activity led many companies based in Romania to pay out wages established by collective agreements and it also induced them to register with the fund. No special unit was established in Rome, however, where trade union representatives are sent into the construction sites: since most workers on a particular project who were employed by subcontractors came from Romania, a Romanian trade unionist was sent. Within these different local circumstances, trade unions try – not always successfully – to achieve compliance with the applicable Italian CLA, most of the times just gaining equal pay as between foreign posted workers and Italian ones.

In the Netherlands the enforcement of provisions in collective agreements falls substantially within the competence of the social partners themselves. Some help is provided in public law, which lays down that social partners or individual workers can request the Labour Inspectorate, for example, to control working conditions in specific companies.¹⁸ However, stakeholders generally agree that these options do not mean very much in practice because the Labour inspectorate has a huge workload and is neither able nor prepared to allocate priority to such requests. Nevertheless, from 2007 on, the Labour Inspectorate has committed itself to notify trade unions of cases of infringement of the law on minimum wages, the aim being to facilitate a petition to the court to demand back pay. By passing on information, trade unions can better enforce the observance of collective agreements. Not only the authorities but also the Dutch social partners have made efforts to enhance compliance in their branches of industry. To this end, at national level, the social partners agreed some guidelines on provisions aimed at better compliance and enforcement of collective agreements.¹⁹ Furthermore, there have been developments aimed at better enforcement of (extended) collective agreement provisions

¹⁷F. Lauria, *Pratiche di distacco transnazionale in Italia. Dall'approccio giuridico all'azione sindacale*, in M. Cilento (ed.), *I percorsi della solidarietà*, Edizioni lavoro, Roma 153 ff.

¹⁸ See for instance Art. 21 WGB m/v, Art. 10 Wet AVV. Often this help from the Labour Inspectorate can only be requested in case of a lawsuit or when legal proceedings are at least being prepared.

¹⁹ See StAR (Labour Foundation) *handhavingskader grensoverschrijdende arbeid* 2007.

at sectoral level. Since the majority of Polish (migrant and posted) employees in the Netherlands are engaged through temporary employment agencies or intermediaries based in Poland, Germany or the Netherlands, the social partners in the Temporary Work Agencies branch have been trendsetters, closely followed by their colleagues in the construction industry. In both branches of industry the social partners established independent compliance offices with competence to enforce the collective labour standards on non-abiding employers (which also has an impact on non-organized employers during the period that collective agreements are declared generally binding).

In Germany the social partners in the construction industry have established a paritarian fund, ULAK, executed by SOKA-BAU. This institution has special monitoring and enforcement competence (see also section 4.5). Its function is to ensure that workers receive their holiday entitlements, by collecting contributions from the employers and granting benefits to employers and workers.

Only informal

In Belgium the social partners also have a role to play in monitoring compliance with the applicable labour conditions, but only informally. In Belgium this is appreciated as a natural process stemming from their articles of association and their mission to protect the interests of all workers active in Belgium. If they perceive irregularities, they can take initiative within the power of the trade unions, such as mediation and regularization of the situation or (spontaneous) collective action; or they can report the situation to the labour inspection services, which investigate further. In some sectors conventions have been or are to be concluded between the social partners and the authorities to jointly tackle issues of unfair competition.

Insofar as the possible resort to collective actions is used as an enforcement strategy, this is also true of the other countries (see also above, section 3.5 on media cases). In the UK, the trade unions used to depend fully on their power to take collective action (quite similar to the Nordic countries),²⁰ but (apart from the problem of absence of legally enforceable sectoral agreements in some industries, in particular construction) after the Viking and Laval ruling they now feel severely restricted in their realm. The effects of the unions' feeling unable to call industrial action when posted workers are involved in the dispute has led here to a wave of unofficial industrial action. One example was the Alstom dispute, which started in 2008 and remains a bone of contention. This related to subcontracting arrangements involving construction at two new power stations: Staythorpe in Nottinghamshire and the Isle of Grain in Kent. It has only just been revealed that, as the GMB Union suspected, one of the subcontractors, an Italian company, Somi, was paying its posted workforce substantially less than it had claimed (a matter of € 1,300 per month), thereby enabling local wages to be undercut.²¹ The infamous industrial action taken at the East Lindsey Oil Refinery was specifically aimed at ending the employment of posted workers, so that British workers could have the

²⁰ Kahn-Freud classified this as systems of collective laissez-faire. See O. Kahn-Freud, Legal framework, in: A. Flanders and H.A. Clegg, The system of industrial relations in Great-Britain, Its history, law and institutions (1954).

²¹ Information drawn from Formula paper T. Novitz, September 2010.

opportunity to do the same work. The incident sparked a number of sympathy walkouts in Grangemouth Oil Refinery, Aberthaw power station, near Barry, South Wales, and a refinery in Wilton near Redcar, Teesside. The dispute gained national and international media coverage, as workers protested under banners which read 'British Jobs for British Workers'. The far-right British National Party (BNP) supported and encouraged the action, even though local activists have denied the significance of BNP involvement.²²

No (reported) role

France, Germany (apart from the involvement of ULAK), Luxembourg and Romania reported no (explicit) involvement of trade unions and/or social partners together in enforcing posted workers' rights.

Other actors involved

In Germany, at undertaking level, the works councils (under § 80 I no. 1 BetrVG) are obliged to supervise compliance with generally binding collective agreements containing minimum employment conditions in line with the German implementation Act AEntG.

In regard to the United Kingdom, the role of ACAS (the Advisory, Conciliation and Arbitration Service) is worth mentioning.²³ ACAS is a statutory agency, nowadays operating under the Trade Union and Labour Relations (Consolidation) Act 1992, which imposes a general duty on the service to "promote the improvement of industrial relations".²⁴ It has powers to intervene (which it used in the Lindsey Oil Refinery case) in trade disputes by way of conciliation and arbitration. ACAS's role reflects a tradition of State support for dispute resolution that can be traced back in a virtually unbroken line at least to the Conciliation Act 1896. Where a trade dispute exists or is apprised, then at the request of one of the parties or at its own initiative, ACAS may offer the parties assistance with a view to achieving a settlement (1992 Act, s 210). Powers to arbitrate in a trade dispute are found in section 212, but these may be used only with the consent of all parties to the dispute. The definition of a trade dispute for this purpose is wider than the definition of a trade dispute used elsewhere in the Act to define the circumstances under which a trade union might take lawful industrial action. In addition, "ACAS may, if it thinks fit, inquire into any question relating to industrial relations generally or to industrial relations in any particular industry or in any particular undertaking or part of an undertaking".

²² Ibidem.

²³ See: <http://www.acas.org.uk/index.aspx?articleid=1342>

²⁴ Although largely funded by the Department for Business Innovation & Skills (BIS), ACAS is a non-departmental body, governed by an independent Council.

(B) Actors involved in monitoring the presence of posted workers

Involvement of public authorities

The existence of requirements to simply notify the presence of posted workers for social security (E-101 forms, based on Reg. 1408/71 (now Reg. 883/2004)) or to register the presence of workers for tax purposes was mentioned in all Member States. However, in this study we restrict ourselves only to such (equivalent) requirements related to the definition of posting of workers in the PWD (viz., on monitoring the presence of posted workers related to labour law).

No authority involved

No public actor is directly commissioned to monitor whether persons who work temporarily in Sweden are in fact posted workers within the meaning of the PWD.

Monitoring authority only for posting of workers with third country nationality

Similarly to Sweden, in Italy, the Netherlands, and the UK, there are no government agencies that register and gather information relating to the number of workers posted to their territories within the meaning of the PWD. Nevertheless, all three countries run permit or visa requirement schemes for (some) posted workers holding the nationality of a third country.²⁵

Pursuant to Article 2 of the Foreign Nationals Employment Act in conjunction with Article 1e, (1), first indent and under c, of the Decree on the application of the Foreign Nationals Employment Act, a work permit is necessary in the Netherlands for workers with the nationality of a third country (thus also EU2 (and in the past EU8) workers) posted by TWAs or other labour-only intermediaries (so the situations covered by Art. 1(3)(b) and Art. 1(3)(c) PWD, as they are considered to enter the Dutch labour market.²⁶ The former Centre for Work and Income (now renamed UWVWerk) is the monitoring authority.

The UK border agency seems to monitor the presence of all posted workers holding the nationality of a third country. The department for Visa services is responsible for processing applications for posted workers' authorization.²⁷

The same is true of Italy. Here, the following procedure for entering in Italy applies to non-EU workers posted under a contract by undertakings (and presumably by Agencies) established in another Member State. This procedure is regulated by a provision of the Immigration Consolidation Act (art. 27, par. 1-bis D.lsg 286/98), which has been recently

²⁵ As the UK Border Agency's website states: Posted workers are exempt from obligations under the Worker Registration Scheme operated by the UK Borders' Agency, which is otherwise applicable to those coming to work in the UK from the more recent member states of the EU.

²⁶ This regulation is contested in the *Vircoplus e.a.* case C-307-309/09. However, in his Conclusion of 9 September 2010 A-G Bot upheld the Dutch interpretation of posting, based on the *Rush Portuguesa* judgment. See also Chapter 3.4.

²⁷ See: <http://www.ukba.homeoffice.gov.uk/eucitizens/rightsandresponsibilities/#header7>

amended (art. 5, par.1.b of the Law 6 April 2007, n. 46²⁸), in order to make it consistent with the EU rules. The new procedure is simpler than its predecessor, but it nevertheless implies the issuance of a ‘resident permit’ by the competent authority. The *recipient* must give *prior* information to the Immigration Office about the contract with the provider, submitting also a declaration by the latter, mentioning that the TCN workers are in a lawful situation in the home state, including visa requirements and conditions of employment. The communication must contain data on the contracting employer, on the contract’s subject, on the contractor company, on the workers designated as responsible for the protection from, and prevention of, health and safety risks, on the employees and on the place of posting. It must also indicate a representative of the provider in Italy. The procedure can be completed online.²⁹ In accordance with the communication between the recipient and the Immigration Office, the competent Authority (Questura) issues to the worker the permit to stay in Italy for the duration of the posting. This more rapid procedure does not apply if the worker is posted within a group; in this case the same procedure as non-EU undertakings is imposed on EU employers, with the consequent enduring possible contrast of Italian regulation with Internal market rules and PWD.

One monitoring authority for all posted workers

Belgium, Denmark, France, Germany, and Luxembourg run notification or ‘pre-declaration’ schemes for posted workers regardless of their nationality and the specific situation of their posting.

In Belgium, the FPS (Ministry for) Employment, Labour and Social Dialogue (website <http://www.meta.fgov.be>) is appointed as the liaison office under art. 4(1) of the PWD. Its website gives information on the so-called LIMOSA notification obligation. This is a general obligation, enacted from 1 April 2007, to notify the Belgian authorities of every form of employment in Belgium of foreign posted employed or self-employed persons.

In Denmark the Working Environment Authority is responsible for monitoring the presence of posted workers under the PWD. Foreign companies can register on the website “BusinessinDenmark” (www.virk.dk). This is identified as the single point of contact on the EU website giving single points of contact (EUGO) at http://ec.europa.eu/internal_market/eu-go/index_en.htm. This website also contains links to information about posting. The register itself is called RUT (Registret for Udenlandske Tjenesteydelser).

In France the direction départementale du travail (local work directorate) of the place where the service will be provided (or the first place of business if the service is to be provided in several places), is the competent monitoring authority for the compulsory pre-declaration of posted workers.³⁰

²⁸ Law 6 aprile 2007, n.46 “*Conversione in legge, con modificazioni, del decreto legge 15 febbraio 2007 n.10, recante disposizioni volte a dare attuazione ad obblighi comunitari e internazionali*”, in G.U. 11 April 2007, n.84. The reform followed the infringement procedure started by the Commission (n.2127/1998).

²⁹ See website of the Ministry of Internal affairs:

http://www.interno.it/mininterno/export/sites/default/it/sezioni/servizi/come_fare/immigrazione/005b_Engagement_of_foreign_workers.html

³⁰ See <http://www.travail-solidarite.gouv.fr/informations-pratiques,89/fiches-pratiques,91/detachement-de-salaries,407/temporary-posting-of-workers-in,8988.html>

In Germany, the Federal Finance Department West (Bundesfinanzdirektion West) – Abteilung Zentrale Facheinheit is the competent (central body) registration office (for registrations pursuant to § 18 AentG as well as for the forwarding of registrations to the competent tax offices pursuant to § 20 AentG; and for registrations according to § 13 MiArbG).³¹ This body is also appointed as Liaison office according to Article 4 of the Posted Workers Directive.

In Luxembourg the authorities who control the rights guaranteed by the PWD are the same as those that control the presence of posted workers and the rules concerning the scope of the posting / the concept of worker posted to the territory, i.e., the Labour Inspectorate and the Customs and Excise Administration .

Social partners involvement

Included in the NAECI agreement between social partners in the British (engineering) construction industry are a range of detailed checks on the numbers of people employed by subcontractors. This is performed by the so-called NAECI auditors.³² In the 2007 Dutch agreement between national social partners to step up enforcement with a view to cross-border work,³³ one of the recommendations was to include a notification requirement in the (extended) collective agreement. However, it seems that this recommendation has not yet been followed in Dutch CLAs.

Registration duties: the sending country perspective

For predominantly sending countries we looked at the registration requirements that exist there for workers posted from their territories. In Estonia, the Social Insurance Board³⁴ registers posted workers sent to another Member State by issuing E-101 forms to employers. In Romania the CNPAS was designated to issue the E101 form. The national legislation stipulates that ‘the E101 form has the role of determining the applicable legislation for establishing the social security rights of migrant workers, employees and self-employed’. The information in the E101 form does not reflect salary level or working conditions; it only reflects information relevant for establishing the social security rights: sickness, maternity and paternity, retirement, invalidity, succession, death allowance, work accidents, professional diseases, unemployment, family allowances. Only those duties pursuant to Reg. 1408/71 / Reg 883/2004 apply in Poland and other countries that regularly ‘export’ posted workers, too.

Local authority involvement

In Belgium, Estonia, Luxembourg and the Netherlands, local authorities, i.e. the provinces or the municipalities, have no role in monitoring the protection offered by the PWD, nor in monitoring the presence of posted workers under their personal scope. The only competence they have that relates to the issue of posting workers is their role in the

³¹ Information from the German Federal Tax Ministry.

³² See for more information:

www.njceci.co.uk/index.php?option=com_content&task=view&id=27&Itemid=43

³³ StAR, handhavingskader grensoverschrijdende arbeid 2007.

³⁴ Information is available at <<http://www.ensib.ee/>>, 1 June 2010.

housing/residence of temporary workers from abroad.³⁵ They can, of course, also be involved through police intervention in certain cases, e.g. if the posted workers are poorly housed. In Germany, customs authorities control compliance with and enforcement of (part of the applicable) regulations on the posting of workers. At regional level there are 40 main customs offices (Hauptzollämter) which are competent.³⁶ In Italy, too, local authorities are involved in monitoring posted workers' rights.

³⁵ As mentioned earlier, Belgian regional inspection services in Flanders, Brussels-Capital and Wallonia are responsible for the control on legislation with regard to the recognition of temporary work agencies or to work permits.

³⁶ In the German national report reference was made to the following web source: Aufzählung der einzelnen Hauptzollämter unter:
http://www.zoll.de/d0_zoll_im_einsatz/b0_finanzkontrolle/k0_ansprechpartner/index.html .

4.3 INFORMATION RESPONSIBILITIES AND REQUIREMENTS

In this section we describe and examine: (A) the *information responsibilities* of the monitoring authorities towards the general public, based on Article 4(3) of the Directive; and (B) the *information required* by those same authorities from other stakeholders, based on Article 5 of the Directive.

(A) Monitoring authorities' information responsibilities

Actors involved and identification of the hard nucleus

In all Member States the appointed liaison offices (the authorities mentioned in section 4.2 above) have the responsibility to disseminate information on posted workers' rights as laid down in law and (generally binding) CLAs (pursuant to Article 4(3) PWD). In practice, the dissemination of information by the responsible authorities focuses on statutory rights. The social partners – in practice mostly the trade unions – are involved in offering information about the applicable CLA provisions.

As mentioned in section 3.6, only authorities in Denmark, the Netherlands and Sweden seem to have identified the applicable rules regarding the hard nucleus listed in art. 3(1) PWD. The Danish Act, however, does not indicate which statutory provisions correspond to which subject listed in Article 3(1) of the Directive. Moreover, the applicable rules are sometimes buried in the statutes identified, since one cannot see just by looking at the identified statutes exactly which provisions are applicable. As regards collective agreements, in the Netherlands and Sweden the implementation Acts merely provide an abstract definition of the types of conditions that may be applicable. The identification of such concrete conditions as may be applicable in a specific sector is left to the social partners. In Sweden it seems that so far only two trade unions have done this. In the Netherlands, social partners in the construction industry and in the Temporary Work Agency sector have classified in detail the CLA provisions corresponding to the hard nucleus laid down in the PWD. However, this work has not yet been done in other sectors, probably because social partners do not afford priority to the matter (national topics are much more important in the bargaining process). Moreover, in some sectors, like transport, the CLAs contain provisions that exclude posted workers from the personal scope of the CLA. The Danish social partners have formulated very specific wage provisions in their collective agreements to correspond with the requirements of the new §6a in the Posted Workers Act which clearly indicate how the wages are calculated. However, they merely specify the rules applicable to the employment relationship without referring in each case to which provisions in the Directive they are intended to implement, or which subject of the directive is implemented by which part of the collective agreements.

Means used to disseminate information

Of the countries examined, Italy is clearly lagging in providing access to the applicable legislation and disseminating clear and effective information about it. Thus, transparency

is one of the most problematic aspects of the Italian implementation. The (scanty) information furnished by official sources is vague and inconsistent with Italian law: in practice, the Directive's provisions are merely repeated, without any account of Italian laws and their possible interpretation.

In the other countries, websites are the most prominent means for disseminating information, followed by information on paper, single points of contact (linked to the implementation of the Services Directive (Dir. 2006/123) and special information campaigns. The situation has visibly improved in comparison to four years ago, when the European Commission in its Communication 159 (2006) concluded that there was major scope for improvement regarding the use of tools to provide information on the terms and conditions of employment during posting, and on the obligations to fulfill.

Websites

The provision of information through internet websites dedicated specifically to the rules applicable to the posting of workers may be assessed as one of the best ways to facilitate access to various types of information by the general public.³⁷ However, if too little (clear) information was available through internet before 2006, now the opposite sometimes seems to be true: too many sources of information may also endanger transparency. In this respect, there should be a clear starting point, on both European level and national levels. Ideally, websites should be user friendly and exhaustive, continuously updated, and accessible in several languages. In practice, many websites still do not come close to this ideal, probably because it would be very costly, time consuming and, last but not least, because there is a certain tension in simultaneously meeting the standards for easy reading and sufficiently precise information.

EU level

According to most national stakeholders, the 'fiches' on the EU website,³⁸ which are meant to be an introductory source of information for foreign service providers and posted workers, are of rather poor practical value in identifying the standards applicable in host countries. Very often, information was found to be outdated, or other inaccuracies were observed.

Welcomed as best practice was a recent initiative of the European Federation of Building and Woodworkers (EFBWW) and the European Construction Industry Federation (FIEC), to launch an internet portal with information on the working conditions applicable to posted workers in the construction industry. The web portal currently provides links to national reports for the 27 Member States on the following issues: mandatory declarations, minimum wages, wage supplements and allowances, maximum working time and minimum rest, health and safety rules, minimum annual paid holiday, temporary work, chain liability etc. However, not all national reports are available at the time of writing.³⁹ Also worth mentioning is the reference in the Estonian report to the

³⁷ Nevertheless it should be noted that workers, in particular in the lower segments of the labour market, may not have internet access.

³⁸ <http://ec.europa.eu/social/main.jsp?catId=726&langId=en> .

³⁹ <http://www.posting-workers.eu/Content/Default.asp>.

website of EURES as a source of information for posted workers on the protection applicable in the country of destination.⁴⁰

National level

The most recently updated information on the labour conditions applicable to posted workers in Belgium can be found on the website of the FPS Labour, Employment and Social Dialogue. This has a homepage in the three official Belgian languages (Dutch, French and German) and another one in English. Full information on all aspects of Belgian labour law can be found in the official languages. The English homepage contains the main rules and obligations on “posting of workers”, on “prevention of major accidents” and on “the FPS” itself.⁴¹ The part of the website concerning the posting of workers contains a general introduction to the posting of workers and a guide to the legal rules of labour law to be complied with by an employer posting workers to Belgium. If the employer or the posted worker wants more detailed information, it is easy to find the contact details of the labour inspection services in order to request it. Although emphasis lies on statutory protection, information on the generally binding CLAs (such as CLAs on minimum wages) is also provided. A web link to this overview of the applicable labour law has also been added to the website at which the Limosa declaration should be submitted. Thus, every employer posting workers to Belgium who has complied with this mandatory notification duty may have had the chance to acquire information on the applicable labour law obligations, together with the legal obligations regarding residence permits, social documents, fiscal obligations and specific arrangements in the Belgian construction sector.

The *trade unions* also try to inform foreign workers about applicable Belgian labour law, both on statutory protection and collective agreements. First of all, the different trade unions publish folders, brochures and newsletters, which they try to distribute as widely as possible. They also have a folder on the very basic remuneration rights for the construction sector (Belgian minimum hourly wages in the construction sector for the different levels of professional skills, mobility allowances, supplements for overtime work, paid holiday), containing an appeal to contact the unions if the foreign workers have a problem. Their complete sectoral guide for the construction sector, with a detailed overview of all the CA provisions, is available in Dutch and French.

The Danish Ministry of Employment (*Beskæftigelsesministeriet*) has put information in Danish on its website about the posting of workers.⁴² At another location on the website, which can be found by searching the Ministry website with the term “Posting”, there is some information in English about posting, but this is primarily directed to businesses and their obligation to register in the Register for Foreign Service Providers (RUT) when they post workers to provide services in Denmark. This site refers to another website, www.virk.dk/RUT, for more information regarding the provision of services and registering in RUT. This site has some information about posting, but it has no

⁴⁰ Information is available at <<http://www.eures.europa.eu>>, 1 June 2010.

⁴¹ See <http://www.employment.belgium.be/>.

⁴² <http://www.bm.dk/Beskaeftigelsesomraadet/Flere%20i%20arbejde/Udlaendiges%20arbejde%20i%20Danmark/Udstationering%20af%20arbejdstagere%20til%20Danmark.aspx>

information on the rules applicable to posted workers' working conditions. The site has a heading "informative links" with a link to posting.dk, which is described as a website where one can find information about "the rules and conditions that are important in connection with secondment" in Danish. The Posting.dk website offers information in four languages: Danish, German, Polish and English. Posting.dk is administered by the Working Environment Authority (liaison office).

The French Ministry of Employment, Solidarity and Public Service provides information on the applicable legislation in six languages, including English, Portuguese, Polish, and German.⁴³ This website provides information about the scope of the legislation, the declarations/authorizations required prior to posting, the applicable labour law standards, legal sanctions in case of infringement and other information. It is basic information, though, at least as far as a minimum wage is concerned. Although mentioned at the very beginning that generally binding collective agreements are also applicable to posted workers, the impression is given further on that there is only one minimum wage to be complied with. Additionally, even where the foreign employer actually knows that there is a collective agreement to be applied as well, the latter is not easy to find. The website has a link to www.legifrance.gouv.fr where all information about French legislation is to be found. However, in this website the only information translated into English and Spanish is about the Labour law code. As a result it is difficult for a non-French speaker to navigate and find the relevant collective agreement. Furthermore, information about the applicable collective agreement might not be accurate as the website information is not frequently updated. For additional information, especially with regard to the applicable collective agreement, the service provider is required to contact the "direction departementale du travail" of the place where the posting is made. The term "direction departementale du travail" is written in French and there is no link to a list of these departmental authorities providing addresses and/or phone numbers. One aspect worth noting is the leaflet prepared by employers' organisation (PRISME), with information on applicable legislation addressed to their clients (user companies) to convince them that when foreign temporary work agencies offer work at much lower prices they might be in violation of French legal labour standards.

In Germany, information is provided by a number of institutions. A quite adequate internet source is hosted by the customs authorities on a website⁴⁴ which gives special information to employers, employees, temporary agency workers and their respective agencies. The website provides links to other useful sites and all the forms necessary for contacting administrative bodies or making declarations. The Federal Ministry for Labour provides a web page in German, English and French containing information on statutory protection.⁴⁵ Especially for the construction sector, SOKA-Bau provides a lot of useful information on their web pages.⁴⁶ Many other institutions provide information for interested and affected people, each designed differently according to style, complexity, language and the respective target group's needs. Current information is often offered via

⁴³ <http://www.travail-solidarite.gouv.fr/informations-pratiques.89/fiches-pratiques.91/detachement-de-salaries.407/>

⁴⁴ http://www.zoll.de/d0_zoll_im_einsatz/b0_finanzkontrolle/e0_aentg/index.html

⁴⁵ http://www.bmas.de/portal/13896/entsendung_von_arbeitnehmern.html

⁴⁶ http://www.soka-bau.de/soka_bau/

electronic newsletters to which people can subscribe and receive free of charge by e-mail. For example, the IG Bau (union for the building and construction sector), the Police union and Verdi publish the newsletter “Law” which deals with legal issues.⁴⁷ In addition, some social partners, such as the iGZ, publish journals for their members.⁴⁸

In Luxembourg the ITM website provides information under the headings “posting” and “Collective bargaining agreements”, in French, German and English. Moreover, the ‘ITM Posting’ operates a helpline and a hotline which receives approximately 1,700 calls a year. More and more requests are made electronically or are satisfied with explanatory information (FAQs) on the ITM website.

The rules are easily accessible, notably by consulting the websites of Legilux, ITM, the various Chambers, as well as various federations, or through published brochures on the subject.

In regard to possibilities for companies to learn about the formalities required in other member states and different laws and their respective level of protection, the Enterprise Europe Network (EEN) deserves to be mentioned. This network is the outcome of a strategic partnership between the Chamber of Commerce, the Chamber of Crafts and Luxinnovation to offer entrepreneurs in Luxembourg privileged access to a multitude of European value-added services. To facilitate the provision of services to Luxembourg by companies in adjacent markets, the Chamber of Crafts offers a range of practical guides and individual assistance.

In the Netherlands the Ministry’s site (www.szw.nl) is translated into Polish, besides which, information is also provided in downloadable brochures in more than six foreign languages. The site and the leaflets also refer to a free telephone number for use by individuals and companies to obtain information. Furthermore, it provides a facility for submitting questions by e-mail. In 2003, the social partners in the construction sector published a special leaflet in English, aimed at posted workers and their employers, updated in 2009 and now downloadable from the internet. The main employers’ association in the TWA sector has translated its CLA into English and publishes easily accessible leaflets that are downloadable from its website, in six foreign languages. These sources of CLA-level information give relatively detailed, comprehensive information about the provisions applicable to posted workers.

In Sweden the responsibility for information on the statutory protection offered to posted workers lies with the Work Environment Authority, which is also responsible for forwarding the information on the conditions in collective agreements that the trade unions may enforce with the support of industrial action and which they are supposed to submit to the Authority. However, its role is not to interpret the provisions and state how they should be applied in case the interpretation is unclear. Only the parties to the agreement and, ultimately, the Labour court, are responsible for interpretation. Thus, when foreign service providers or their workers have such questions, the Authority

⁴⁷ http://recht.verdi.de/newsletter_recht

⁴⁸ <http://www.ig-zeitarbeit.de/medienservice/z-direkt>

directs them in the first place to the parties to the agreement. The information to foreign employers and their posted workers has been improved of late. The Work Environment Authority has a separate section on its website with information on the applicable rules. Information is published in eleven languages: English, Estonian, Latvian, Lithuanian, Polish, Spanish, Turkish, Chinese, Thai, and Vietnamese. In 2009, the Work Environment Authority produced an easily accessible booklet that describes not only the applicable rules on working and employment conditions, but also other kinds of rules that are relevant to posted workers. The booklet can be downloaded from the Authority's website. The Building Workers Union website has information directed to foreign workers in nine languages. It explains the Swedish system of collective bargaining and collective agreements in general terms, informs workers of their rights, and encourages them to join the trade union. It also offers foreign workers help from interpreters. Its counterpart on the employers' side, the Swedish Construction Federation, has corresponding information on its web site, where it points out the advantages of being a member of the employers' association over having an application agreement directly with the trade union. This information is available in English only.

In the UK there are a number of websites that give information about rights at work generally, including <http://www.direct.gov.uk>, which has a section on 'Employment terms and conditions', although the prominent item on the front page is a reference to a Business Link providing practical support for employers. Nevertheless, the website has a section on 'Working in another EU member state' which gives some very basic information covering the position of someone posted from the UK as well as someone posted to the country. So far as workers posted to the UK are concerned, the website includes a section on 'Basic employment rights guidance in foreign languages'. There is information on the website in a number of EU languages (Bulgarian, Hungarian, Latvian, Lithuanian, Polish, Portuguese, Romanian and Slovak – but notably in the aftermath of East Lindsey, not Italian). The English language version of the document dealing with the Statutory Minimum Wage does not expressly state that the SMW applies to posted workers, though it does state that it applies to 'foreign' workers. The government website gives limited information about collective agreements. However, the NAECI agreement is also available on the internet. The website also directs workers to other sources of advice, including those provided by ACAS. According to the government, the ACAS helpline "offers free, confidential and impartial guidance on employment rights and workplace issues". According to the government, the helpline takes calls in over 100 languages.

(Other) good practices

Special projects

The Belgian and Dutch reports mention special activities of the trade unions, such as a volunteer project focusing on language groups among posted workers (BE), the publication of a paper newsletter in five languages (Dutch, Spanish, Portuguese, Polish, Turkish⁴⁹), which is distributed through several channels and deals with the basics of several aspects of Belgian legislation (fiscal obligations, paid holiday, health care

⁴⁹ Many Turkish Bulgarian people are posted to Belgium, as they are in contact with the large Turkish community in several Belgian cities.

insurance) (BE). In both countries temporary projects called “Poolshoogte” (BE) and ‘Kollega’ (NL)⁵⁰ were initiated to improve knowledge about the functioning of the trade unions and to respond to the special information needs of Polish workers and for recruitment purposes. For these projects, some Polish nationals were hired to communicate with and act as the confidantes of the Polish workers. In the context of these projects, different methods are used to reach the Polish community, including folders, flyers, information meetings, and contacts with the consulates. In the Netherlands, experiments with a form of awareness raising and collective action called ‘organizing’ have been launched in several sectors employing a lot of foreign workers, which was very successful in the cleaning sector. In Germany, too, information events, continuing education and seminars are offered by some institutions, such as IG Metall (metalworkers' union),⁵¹ Good practices mentioned in the report on Luxembourg include participation of the ITM in international conferences on the topic of posting workers or in the “Grande Région” / “Grossregion”,⁵² information nights and local initiatives such as ‘the House of Luxembourg’ in Thionville.

These efforts to inform workers (and sometimes also employers) personally, may be assessed as indispensable when raising awareness of their entitlements and should therefore be classified as good practice. Several national stakeholders (BE) confirmed that the official electronic tools are not often used by workers as a primary source of information (if they are informed at all). However, evaluation of the Dutch union projects was not positive regarding the investments of time and money set against the revenue from new members. Hence, one may doubt whether trade unions (at least) will be able to continue these necessary projects over the long term.

Points of Single Contact

In several Member States (DK, LUX, UK) – mainly online – ‘Points of Single Contact’ have been set up to find out about doing business and to apply for licences. In the latter two countries these information channels are purely focused on firms. However, in Denmark four one-stop-shops – in Copenhagen, Århus, Odense, and Ålborg – for foreign workers and businesses are being established. This initiative was begun this year (2010). The one-stop-shops are set up as shared offices with the central government authorities, which are to second their staff to supplement pre-existing municipal units, including WorkinDenmark Centres⁵³ (which are intended for people interested in finding jobs in Denmark and which are run by the Labour Market Authority), the Immigration Service, and the tax authorities. The one-stop-shops can be contacted in writing, by e-mail, by telephone and in person on two days in the week. The goal of these one-stop-shops is to provide foreign workers help with completion of forms and to provide information on regulations and services. These one-stop-shops are not specifically intended for posted

⁵⁰ Only partly successful with regard to recruitment purposes due to several structural factors, mentioned in section 4.5 below, which are difficult to influence. Also too expensive to implement structurally.

⁵¹ http://www.igmetall.de/cps/rde/xchg/internet/style.xsl/view_1137.htm

⁵² “Grande Région” / “Grossregion” means the Saarland - Lorraine - Luxembourg - Rheinland – Palatinate, “the Walloon region and the French and German speaking Communities of Belgium”. Situated between Rhine, Mosel, Saar and Meuse rivers, it has a total area of 65,401 sq. km.

⁵³ <https://www.workindenmark.dk/>

workers, but to all foreigners who are working or wish to work in Denmark, and foreign businesses.

Information made available in the workers' country of origin

In some host Member States, efforts have also been made to target information on workers and firms in the sending countries. The ITM in Luxembourg makes information available in the country of origin through liaison offices and various professional chambers. An example is the cooperation with CRD EURES-Lorraine on the brochure "Posting guide". As the new Limosa declaration was a very important change for foreign employers who post workers to Belgium, the information campaign also included actions in sending Member States, e.g. advertisements in papers in the sending Member States or direct mail. With regard to Romanian workers, the Dutch state actively seeks to inform workers on employment possibilities and conditions through its embassy.

In Sweden the Work Environment Authority also plans to make the information available in the workers' countries of origin, by disseminating printed information through Swedish embassies and consulates. The Polish embassy in Paris mentioned that several Polish service providers have contacted them to obtain additional information on applicable law in France.

For German workers who are posted abroad, leaflets containing information on host states can be found on the DVKA website (Umbrella Organization of the Statutory Health Funds (GKV-Spitzenverband DVKA); in Germany partly responsible for issuing E-101 forms).⁵⁴

Also worth mentioning is a Guide issued by the Romanian Ministry of Labor, Family and Social Protection, destined both for Romanian companies that post workers in another Member State and for Member State companies that want to post workers to Romania. The information available in this Guide refers to documents necessary for posting, conditions specific to posting in various Member States, control measures, social security, institutions involved in the process of posting workers.⁵⁵

In Estonia, employers have sometimes requested information about working conditions in the host country from the Labour Inspectorate. In this case, the Labour Inspectorate gives employers the details of the corresponding competent authorities in the host state.

(B) Information duties imposed by the monitoring authorities

From the predominantly sending countries Estonia, Poland and Romania and from some other countries which feature not only as a host country but also as a sending one (B, DE⁵⁶, FR, NL), we gathered information about the duties an employer established in their countries would have when posting his employees to another country. In this respect, the answers in all countries were similar: Only an E-101 form is required pursuant to the social security regulation (former Reg. 1408/71, now Reg. 883/2004). Besides this, it was

⁵⁴ <http://www.dvka.de/oeffentlicheSeiten/ArbeitenAusland/MerkblaetterArbeiten.htm>

⁵⁵ http://www.mmuncii.ro/pub/imagemanager/images/file/Domenii/Mobilitatea%20fortei%20de%20munca/140110Ghid_detasare.pdf

⁵⁶ In fact, in absolute terms, Germany is the largest sending country.

mentioned that employers of posted workers have to comply with the provision of information duty to the posted worker according to Directive 91/533. But this obligation only seems to be subject to the supervision of the Labour Inspection in its role as a sending state in Estonia. Here, failure by an employer to submit information is punishable by a fine of up to 100 fine units.⁵⁷ The same act if committed by a legal entity is punishable by a fine of up to EEK 20,000 (i.e. EUR 1282). In Romania the information provided by the employer should be verified by the trade union, if the posted worker is affiliated.

In the remainder of this section we only examine the information duties imposed by countries in their role as a host state. Subsequently we look at statutory and self-regulatory duties on service providers and duties imposed on other actors. However, we do not include possible requirements to submit information on the posting of workers in the host country *solely* for social security and tax purposes,⁵⁸ as well as for the sole purpose of monitoring posted workers with a third country nationality, as is the case in the Netherlands,⁵⁹ at least in part, and fully in Italy and the UK (see section 3.4 and 4.2 above under (B)).

Together with Sweden, which does not impose any licensing and authorization requirements, these countries may be regarded as being particularly generous in their treatment of foreign service providers (with EU workers), in comparison to other (predominantly) host states that do impose many such requirements. The UK government, disregarding the requirements it imposes on posted workers with a third country nationality, even likes to present itself as such a country, which was obvious from a response from the Parliamentary Under-Secretary of State for Employment Relations in the Department of Trade and Industry, Jim Fitzpatrick, to the Commission Communication of 2006 regarding the scope of registration and control mechanisms: “We will not have to change our control measures, as we do not place unjustifiable or disproportionate requirements on foreign companies temporarily posting their workers to the UK... monitoring and sanctions for non-compliance with the employment rights specified by the Posted Workers Directive is identical to that available to domestic workers...”.⁶⁰ Despite this proud comment, comments in all four countries permit the assessment that such a generous attitude to service providers leads to serious lacunae in the monitoring and enforcement of the rights conveyed in the Directive.

Regarding Italy, it should be noted that determining whether or not several information

⁵⁷ According to § 47 (1) of the Penal Code, a fine unit is the base amount of a fine and is equal to EEK 60 (i.e. EUR 3.80). *Karistusseadustik*/Penal Code, passed on 6 June 2001 – RT I 2001, 61, 364; 2010, 29, 151. The Act is available in English at <<http://www.legaltext.ee/text/en/X30068K7.htm>>, 1 June 2010.

⁵⁸ The definition of ‘posted worker’ for social security and tax law purposes is not fully equivalent with that of the PWD. Thus, the monitoring activities do not fully overlap as well. It would require a different (but recommended) study to look at monitoring of posted workers from a comprehensive approach (including all relevant legal disciplines).

⁵⁹ Information requirements with the single purpose of monitoring posted workers with a third country nationality presence of posted workers are part of national migration law rather than of national labour law and therefore not relevant for the monitoring and enforcement of the PWD as such. Thus, when the duties on the recipient of the service are dealt with further below, the Dutch WAV (foreign nationals labour Act) is not covered.

⁶⁰ Cited from the Formula paper on the UK of T. Novitz, September 2010.

requirements are imposed on the service provider depends on how the legislation is interpreted. Since the Italian rules on social documents (payslip and *Libro Unico del Lavoro* regulated by Article 39, Law 133/08⁶¹: LUL) are not applicable to undertakings established in other Member States, it was concluded by the national expert that there are no obligations in this respect on the foreign service provider. Nevertheless, as he pointed out, the “general” Italian legislation on labour inspectorates activities,⁶² allow one to infer that, in case of the absence of documents proving the condition of employment of PW, the competent authority can ask the provider to produce documents equivalent to LUL (and payslip) translated into Italian, kept in the State of origin (ex Article 14, D.lgs. 124/04).⁶³

Statutory duties on service providers

Below we examine only those countries where governments have established a notification/registration requirement in general for the posting of workers in the framework of the PWD, so regardless of their nationality and of their specific situation of posting. The similarity between the different national requirements in Belgium, Denmark, France, Germany and Luxembourg, is that they are all addressed primarily to the service provider. A similarity also arises from remarks on the effectiveness of the registration requirements: on the one hand, registration is welcomed since it at least enables the responsible government agencies to fulfill their monitoring and enforcement tasks, while on the other hand interviewees in all countries but Luxembourg⁶⁴ point to the problem that many service providers ‘forget’ to notify. Hence, notification schemes seem to be a precondition for monitoring but are certainly not infallible instruments in practice. In Belgium and, very recently, in Denmark, this has led to measures making the user undertaking/recipient of the service co-responsible. Noteworthy in these countries are also the exemptions for very short postings or, in Belgium, postings with a specific character. These exemptions are in line with the spirit of the PWD. The requirement in Germany and Luxembourg to submit the documents service providers have to provide to their employees pursuant to Dir. 91/533 and, in Luxembourg, the possibility for ‘repeat players’ to submit only a ‘light declaration’ are also worth mentioning.

As we shall see, with regard to additional requirements such as the need to ask for prior authorization or to keep employment documents available for the authorities, or to appoint a representative, the situations in the five countries differ considerably. Denmark has no additional obligations, whereas France, Germany and Luxembourg seem to have them all. France and Germany also require certain documents in their official languages. The comments of the interviewees on these aspects also differed; sometimes (as in Lux) it

⁶¹ Law 6 August 2008, n.133 , in G.U. 21 August 2008, n.195; on the Libro Unico del Lavoro (Unique Employment Document) see also the instructions by the Ministry of Labour (Circolare 21 August 2008, n.20)

⁶² Rules on social documents and on controlling activities by labour law authorities can only be inferred by the general law on labour inspectorates (D.lgs. 124/04). This creates a situation of uncertainty about the formalities to respect, both for the provider and for the recipient

⁶³ In case these documents are not produced or are unsatisfactory, the inspector should impose administrative sanctions on the foreign employer (fines range from 515 to 2.600 Euro, ex Art.11 D.P.R. 520/55 and art.1 comma 1177, L.296/06.

⁶⁴ Perhaps the advantage of scale (small country) may be an explanatory factor here.

was stressed that the requirements go too far, but problems of really enforcing these requirements were also heard. On the other hand, in Denmark – which does not have such additional obligations – more comments were made as to the difficulty of gathering concrete evidence. In Belgium, exemption from more far-reaching information requirements is linked to the notification duty. This may serve as a ‘carrot’ for service providers.

A last remark concerns the difference in penalties and fines. Germany and to some extent Belgium catch the eye with regard to the high (maximum) level of their fines, whereas France seems to have no very dissuasive penalties due to their rather low level. In Denmark nothing is known about the level of the fines at the time of writing, whereas Luxembourg seems to have the best balanced penalties as regards proportionality on the one hand and dissuasiveness (or even business friendliness) on the other. No administrative fines are imposed but rather a lot of compliance orders.⁶⁵ A clear advantage of this sanctioning method is that it avoids a lack of result ‘at the end of the day’. This lack of effectiveness was noted in Belgium, France and Italy, where a statement of offence does not necessarily lead to prosecution, since the ‘Labour Autoritate’(BE)/Public Attorney decides on this and often does not seem to give priority to offences related to the posting of workers.

On the whole, Belgium, Germany and Luxembourg seem to have the most advanced schemes, to a certain extent triggered by the fact that their legislation on this point was severely criticized by the European Commission and the subject of several cases before the ECJ. Of these countries, Belgium certainly surely has the ‘competitive’ advantage of early experiences with making domestic registration requirements more user-friendly with the help of electronic, single-point-of-contact ‘front desks’ (such as the ‘DIMONA’ system and the so-called ‘Kruispuntenbank’ – crossroads bank).⁶⁶ From that point of view, but also from the perspective that a balance must be sought between excessively rigid (disproportionate) and overly loose (neither dissuasive nor deterrent) rules, many aspects of this system on the notification of posted workers may certainly be labeled ‘best practice’.⁶⁷

⁶⁵ Also in a purely domestic context, in labour law, ITM proceeds by informal mediation. If mediation fails, a summons is sent, with a threat that the case will be sent to the Prosecutor if the irregular situation persists. Often this threat is sufficient for the company to comply with the law. In any event, the order of compliance issued by the ITM must be followed up, because if it is not, ITM is also entitled to impose an administrative fine.

⁶⁶ See <http://statbel.fgov.be/nl/ondernemingen/KBO/index.jsp> and https://www.socialsecurity.be/site_nl/Applics/dimona/index.htm

⁶⁷ As was confirmed by all stakeholders. Nevertheless, complaints about the Limosa notification for self-employed, have led to an infringement procedure by the European Commission. See pending ECJ case 577/10 as regards the compatibility with Article 56 TFEU of the same registration/notification as applied to self-employed. Although there was a policy debate about the desirability of creating an exemption from the Limosa declaration for the purposes of intra-group training, this was put on hold.

Aim and/or background

In Belgium, the information requirements for employers posting workers to Belgium have been highly simplified in recent years thanks to the introduction of the mandatory Limosa declaration.

The aim of the broader LIMOSA project, of which the LIMOSA notification for posting is an important measure, is to create a central database (LIMOSA = cross-border information system for migration research in social administration) concerning the employment of foreigners in Belgium; to set up an electronic surveillance and monitoring system for the employment of foreigners in Belgium, to ensure administrative simplification (the foreign worker is exempted from particular administrative formalities). The objective is thus to promote the free provision of services and free movement of workers and to better protect the rights of foreign workers in Belgium. The Belgian government introduced the declaration for monitoring and statistical reasons and sees it as the implementation of the decisions of the Court of Justice in cases against Luxembourg⁶⁸ and Germany,⁶⁹ in which the Court recommended the introduction of a mere notification of the posting of workers.

In Denmark until 2008 no public authority monitored the presence of posted workers, nor was there any mechanism for doing so. In 2008 the Danish parliament amended the Posting Act, adding new sections §5a-c, to require foreign companies that post workers to Denmark for more than eight days in connection with delivery of services to register with the Danish Commerce and Companies Agency (*Erhvervs- og Selskabsstyrelsen*).⁷⁰ The trade unions had been complaining for years about the lack of monitoring of the number of foreign workers in Denmark and the 2008 amendment was intended to rectify this problem. However, the registration requirement has not worked well in practice, as it appeared that a number of foreign companies did not register when posting workers to Denmark. Therefore, on 4 December 2009 the Danish government concluded an agreement with the opposition to enact legislation requiring the *Danish contractor* to ensure, inter alia, that the *foreign service provider*, including a self-employed service provider, registers with RUT. A legislative proposal to amend the Posting Act was prepared and submitted to Parliament on 17 March 2010 and adopted on 11 May 2010.⁷¹ The new rules entered into force on 1 June 2010.

In Luxembourg, the notification scheme has also been subject to administrative simplification, aimed at reducing the number of documents to be processed daily, giving sending companies, previously selected by the ITM Posting Department, the option to send a monthly notification rather than a daily one. As an illustration, in 2008, 6,537 e-mails, 7,151 faxes and 5,075 postal letters (registered or not) were processed by the ITM Posting Department, which corresponds to 18,763 messages, i.e. approximately 75 documents to be processed every working day, compared to 22,086 in 2007. Following these written notifications, 857 requests for additional information generated by

⁶⁸ Case C-445/03 *Commission vs. Luxembourg* [2004] ECR I-10191.

⁶⁹ Case C-244/04 *Commission vs. Germany* [2006] ECR I-885.

⁷⁰ Act nr. 633 of 23/4/2008, § 5a.

⁷¹ Act nr. 509 of 19/05/2010.

incomplete posting statements were sent to relevant firms (i.e. a rate of 4.6%). During these postings, approximately 12,500 ‘new’ employees were posted on the Luxembourg territory, in addition to the 33,542 employees already registered before 2008. By ‘new’ employees is meant workers in sending companies who sent a primary declaration (first notification of posting) in 2008.

Content of the information requirements

In Belgium, service providers are *not obliged to ask for prior authorization* to post workers in order to provide their services in Belgium. They are free to provide services in Belgium and do not need any approval to enter the Belgian territory when using their posted workers for the provision of these services. The only obligation in this respect that rests on them is *to make a declaration prior* to the posting of the workers to Belgium, according to the 2006 legislation⁷² on the Limosa declaration, which entered into force on 1st April 2007.

The requirement is made as user-friendly and ‘red tape’ free as possible: a *foreign employer* posting gainfully employed workers to Belgium, or *his authorized representative*, must notify the authorities via the website ‘www.limosa.be’ (or by letter or fax) before the employment of the workers in Belgium. A receipt is issued immediately. This document is called the “L-1”, and serves to prove that the posting of workers has been declared. It is thus important for the (exemption from) liability of the posting employer and the user undertaking. The data that have to be submitted when declaring the posting concern the identification of the worker(s), the employer and the user undertaking; the first day of posting; the duration of the posting; the type of services; the workplace; the weekly working time; and the work schedule.⁷³ In case the labour inspectorate were to receive notice of a posting after a certain period, this does not make any difference to the practical application of directive 96/71 and its implementation legislation. The service provider can be summonsed retroactively. An employer that has not complied with the mandatory declaration of the posting of workers risks a *prison sentence* (8 days – 1 year) and/or fine (between € 500 and € 2500, multiplied by 5.5). The *fine* is multiplied by the number of workers for whom he did not comply, up to a maximum of € 125,000. An administrative fine can also be imposed (between € 1875 and € 6250).

In Denmark, foreign companies, including the self-employed service provider, should register on the website “BusinessinDenmark” (www.virk.dk). This is identified as the single point of contact on the EU single points of contact website (EUGO) at http://ec.europa.eu/internal_market/eu-go/index_en.htm. This website also contains links to information about posting. The register itself is called RUT (Registret for Udenlandske Tjenesteydelser). From 1 June 2010 on, service providers from other Member States must also provide documentation of their registration with RUT *to the recipient* of the service

⁷² Programme Act of 2006 (Programmawet (I) van 27 December 2006, B.S., 28 December 2006).

⁷³ The Belgian rapporteur observes that one might doubt whether the weekly working time and the work schedule are compatible with the label of a “mere declaration of their presence”, as the provision of such data leans towards actual control of compliance with the substantive protection offered under the applicable labour law.

in Denmark, in case the service relates to construction, forestry or horticulture.⁷⁴ According to the new § 7d, which was added by legislation adopted on 19 May 2010 amending the Posted Workers Act, the service recipient must inform the Working Environment Authority if he has not received documentation of the service providers' registration with DCCA within three days after the provision of services has begun or if the information provided is incomplete or incorrect. Failure on the part of the recipient of the service to comply with this obligation is punishable by a fine, according to § 10a(4) of the amended Posted Workers Act. The legislation does not specify the amount of the fines and there is no case law at the time of writing.

If the service provider is established in a third country and posted workers are also nationals of a third country, they need to produce both an authorization to work in France and a residence permit, stating "temporary worker" status (articles L.5221-2 and following *Code du Travail*). In several cases they might also need a visa to be able to enter French territory. Third country nationals who regularly reside and work for an employer established in the EU, EAA Switzerland, Romania or Bulgaria, do not require any prior authorization to work (article R.5221-2 n°2 C.trav.). However, when the duration of posting exceeds three months they must hold a residence permit stating they are an "EC employee of a service provider". The residence permit is issued by the Prefecture of the place of residence and should be requested within three months of the date of entry to French territory. The employer (service provider) who posts one or more workers to the French territory must, *prior* to the posting, address *a declaration* to the Labour Inspectorate of the area where the service is to be provided or, if the service is to be provided in more than one location, to the Labour Inspectorate of the first location where the activity is to be performed (article R.1263-3 *Code du Travail*). The declaration should be made *before commencement of the service provision* and can be sent either by certified mail with delivery receipt or by fax and e-mail, as long as it is *written in French* (article R.1263-5 *Code du Travail*). The declaration of posting should include information on the identification of the employer, the service provider's representative in France, the client/recipient of the service and the posted worker(s), as well as his/their qualifications/skills, and position occupied and the gross monthly salary during posting; the first day of posting; the (foreseen) duration of the posting; the type of services; the workplace; the nature of the materials; and any dangerous work processes involved; hours of work including commencement and termination; duration of rest; and address of collective accommodation if applicable. Where the service provider is a *temporary work agency* the declaration should also contain the name and address of the institution where social security contribution payments are made, as well as the name and address of the institution that has provided a financial guarantee in the country of origin (article R.1263-6 *Code du Travail*). In the absence of such a declaration, article R.1264-1C.trav., provides that the employer of the posted worker is subject *to a fine* of the 4th class, € 750 maximum.

In Germany, according to § 18 paragraph 1 sentence 1 AEntG, posted workers must be registered in writing *before* providing services. The obligation to register applies only to employers located abroad. The *registration* must be in writing and *in German* and must

⁷⁴ Act nr. 509 of 19/5/2010 § 7e.

be done with the competent customs authority. The official form 033035 has been developed for the registration, which can be downloaded from the website of the customs authority.⁷⁵ A special official form has been developed for the cleaning services branch (Gebäudereinigungsbranche), which can also be downloaded from the customs authority's website.⁷⁶ Registrations must contain all information listed in of § 18 paragraph 1 sentence 2 AEntG, which are: family name, name and date of birth of the workers posted according to the AEntG; commencement and the expected duration of the posting; place of employment, in case of construction work the construction site; place where all documents within the meaning of § 19 AEntG are kept; family name, name, date of birth and address in Germany of the appointed *representative(s)* (verantwortlich Handelnder(n)); branch to which the workers are to be posted; and the family name, name and an address for service in Germany (Zustellungsbevollmächtigten), as long as this is not the same as that of the responsible agent. Any changes must be notified. There are particular regulations for registering *temporary agency workers* (Leiharbeitnehmer) (§ 18 paragraph 3, 4 AEntG). Non-compliance with these obligations will be classified as an administrative offence in the sense of § 23 paragraph 1 nr. 5 AEntG, for which a *fine* of at most 30,000 EUR may be imposed (§ 23 paragraph 3 AEntG).

In Luxembourg, pursuant to article L. 142-2 of the Labour Code, foreign service providers must notify the Labour and Mines Inspectorate (ITM), by communicating at that moment by any useful and traceable means, including e-mails, the elements indispensable to the legal monitoring to be conducted by the ITM, which are: identification data of the posting employer and its effective *representative* (who will hold the documents necessary to verify compliance with working conditions, wages and employment), the place accessible and clearly identifiable in Luxembourg where the documents in question will be kept available for the Labour and Mines Inspectorate; the start date and expected duration of posting; the place or places of work in Luxembourg and expected duration of works; the full names, surnames, dates of birth, nationality and occupations of employees; the capacity in which the employees are hired in the company and the profession or occupation to which they are regularly assigned, and the activities they perform during the posting in Luxembourg.

In practice, this information is given on a form available on the website of the ITM, in French, German and English.⁷⁷ If the undertaking works in Luxembourg every day, or several times a day, the undertaking must inform the ITM with its first declaration. ITM will allow it to report its activities all together by the end of the month. This period may be extended by mutual agreement up to six months. Thus, a declaration is required, even if the work only lasts a few hours. A declaration is also required for very focused activities, unless for urgent and unforeseen repair or maintenance work lasting less than 48 hours.

The sending company must *appoint a representative* during the posting in Luxembourg and indicate to the ITM the name and address of an individual or a corporation freely and

⁷⁵ <https://www.formulare-bfinv.de/ffw/form/display.do?%24context=0>

⁷⁶ <https://www.formulare-bfinv.de/ffw/form/display.do?%24context=0>

⁷⁷ http://www.itm.lu/faq/sr_detach/faq_posted_PWI?set_language=en

clearly determined. This person may be one of the posted workers (article L. 142-3 of the Labour Code).⁷⁸

Any change to important data, such as the temporary holding person, the place of work, the posted workers, must be notified to the ITM. Holding of documents: the necessary documents for control labor conditions are not to be sent materially to the ITM, but must be kept under closed confidential conditions during the entire period of posting in a precisely defined and physically accessible place, by a temporary holding person (“THP”) in Luxembourg, freely chosen by the posting employer (“PE”). Description of the “THP”: it may be simply either a customer or a person of trust in Luxembourg, or a posted worker on the services site. No administrative fine or penalty (as is the case in other EU Member States) currently accompanies this measure. Where under the terms of Article L. 142-3. § 2, the required documents were not made available to ITM before starting work in the place of posting, an administrative penalty is issued: a “compliance order”.⁷⁹ In practice, the company is given 24 hours to comply with the law. During these 24 hours, the company can continue its business, except in circumstances of grave and imminent danger concerning safety and health at work or illegal work. The company must submit a declaration of posting to ITM within that deadline. If it does not, ITM conducts a second spot check. A notice of administrative penalty may be decided. A summons to the Departmental Direction of ITM (Legal Services) is notified to the company. At this meeting, an order to “cease and desist from violations of labor law” may be issued for exceeding the maximum hours of work or failure to meet minimum periods of rest. In case of illegal staff leasing, a verbatim record is made and conveyed to the prosecutor [Parquet].⁸⁰

Exemptions from the personal scope

There is a general obligation to notify every form of employment in Belgium of *posted employees or self-employed persons* to the Belgian authorities, including posted trainees. However, some categories of persons are exempt from this notification because of the nature or short duration of the activities carried out in Belgium (e.g.: artists, international transport sector, diplomats, participation in a scientific congress, etc.). For workers who are regularly posted to Belgium (working regularly in Belgium and in one or more other countries), a declaration of frequent activities has been introduced, providing the

⁷⁸ This person is not liable for the detention in question, and is not supposed to provide information on the contents of the envelope he /she carries http://www.itm.lu/faq/sr_detach/sous-rubrique-detachement-de-travailleurs/faq_detach_ppd

⁷⁹ ITM Report, 2008 (<http://www.itm.lu/itm/rapport-annuel/rapport-annuel>): A total of 66 stop work orders were issued in 2008, 39 by SDTI officers and 27 by agents of the Customs and Excise Administration. Furthermore, 21 warnings for non-declaration of posting to ITM were sent and 5 summonses to the Executive management of ITM for non-compliance with measures already issued were executed.

⁸⁰ Information drawn from “Posting of workers in Luxembourg” (“Détachement de salariés au Luxembourg”), intervention of Claude Lorang, deputy director of the ITM, as part of the seminar “Assessing the implementation of the directive concerning the posting of workers in the framework of the transnational provision of services, held in Strasbourg, on 25 and 26 March 2010, Slides 18 and 19 “Penalties for the failure of a posting communication” (“Sanctions de l’omission d’une communication de détachement de salariés”).

opportunity to submit a declaration valid for 12 months, is renewable every year.⁸¹ The Danish registration requirement does not apply to delivery of technical installations or to workers posted to Denmark in order to install, repair, inspect or inform about a technical installation in Denmark. Until 1 June 2010, it did not apply to self-employed service providers either.

(Exemptions from) more far-reaching information requirements

Service providers established in other Member States are generally not obliged to keep information available for the competent authorities and they are *not* obliged either to obtain *prior authorization* before delivering service in Denmark. Nor are there any statutory requirements regarding posted workers' *employment documents* to be kept at the place where the work is habitually carried out or where the service provider is established. However, foreign companies that wish to deliver services in Denmark for the first time must register both the service and the company for tax purposes. The website www.virk.dk has been set up for more information and registration.

In Belgium, the Limosa declaration *exempts* service providers from the *obligation to keep other social documents or forms* according to the Belgian legislation on social documents, relating to specific employment conditions which must be respected during the posting. It suffices to show the L-1 as a proof of declaration of the posting of workers. However, this exemption from the retention of social documents according to Belgian legislation has a limited duration of 12 months.⁸² After these 12 months, social documents have to be drawn up according to Belgian legislation. The posting employer will have to draw up a record concerning the terms and conditions of employment ("arbeidsreglement"), a staff register ("personeelsregister") and respect the provisions concerning part-time employment.⁸³

As to monitoring compliance with the provisions on minimum wages, the employer is also exempted from the obligation to draw up a pay slip according to Belgian legislation, but this exemption is independent of the Limosa declaration as it does not require any data on the wages of the posted workers. The employer is *exempted from this pay slip obligation on the condition that he can present "comparable documents"*, i.e. documents that enable the labour inspection services to check the wage situation of the worker, at least "on paper". If these are not available, pay slips will have to be drawn up according

⁸¹ Because of the fear of abuse, this "declaration of frequent activities" is not available in the construction sector and in the temporary work sector.

⁸² This exemption does not seem to be entirely in line with the developments concerning the posting of workers at the European level. It is not only a national view on the duration of service provision, it also contrasts with the new rules on the posting of workers in the newly applicable Regulation 883/2004 concerning the coordination of social security schemes, which has introduced a standard period of posting of 24 months. See Article 12 of Regulation 883/2004. It is also common practice to extend these "social security postings" to a maximum period of 5 years. However, in practice, labour inspection services do not stick rigidly to the period of 12 months and are satisfied if they receive comparable documents.

⁸³ After the exemption period of 12 months, when the record has to be drawn up by the foreign employer according to Belgian law, working outside the working schedule indicated in the record does not prove that additional hours have been performed by the workers. According to the Belgian expert, the usefulness can thus be questioned, which could make the measure disproportionate.

to Belgian legislation. The service providers must be able to send a copy of these comparable documents to the Belgian inspection services, at their request, during a period of 2 years after the end of the posting period.

If the employer has complied with the mandatory Limosa declaration, *no other social documents have to be retained in the workplace in Belgium* nor in the state where the posted worker habitually carries out his activities or where the service provider is established. He does *not have to designate a representative during the posting period*. Although the labour inspection services would appreciate the introduction of such an obligation, questions related to the liability (of the person or the company) prevent its introduction.

According to French law (article R.1263-1 *Code du Travail*), whenever required, the employer of the posted workers must be able to provide to the Labour Inspector the *following documents* in French and without delay: a certificate of the service provider's compliance with the social security legislation in the country of origin, where the service provider is established outside EU; the work permit when required; a medical certificate for employers established in the EU, EAA or Switzerland; and *a pay slip* (when the posting's duration is over one month) containing information about: a) minimum salary and salary payment, including increments for overtime; b) hours of work including those paid at normal rate and those paid at overtime rate; c) paid leave and Bank holidays; d) application of the bad weather scheme; e) name of the sector-wide applicable collective agreement. If the duration of posting is less than one month the Foreign Service provider is required to provide any other document certifying payment of minimum salary. French law provides for "equivalences" in four cases: pay slips, affiliation to an annual leave scheme, financial guarantee for temporary agencies,⁸⁴ and medical certificates. In all these cases the service provider can submit an equivalent document established in the country of origin as long as that document has been written in or translated into French. If the service provider does not comply with the Labour inspector's request to provide the aforementioned documents he is subject to a 3rd class *fine* of € 450 maximum.

As mentioned previously, the service provider must specify in the declaration of posting the name and address of his *representative* for the duration of the service provision. This representative might be one of the workers posted, or another person such as the client (service recipient). Labour law/ immigration / fiscal and social security authorities do not use any shared forms such as the E-101 to provide additional information. However, they do exchange information and conduct coordinated controls, either in the context of the regional/departmental committees established in order to fight fraud (ex-COLTI), where each one of these authorities is represented, or in a rather informal way when, for instance, a labour inspector takes the initiative to inform the migration, social security or fiscal authorities of suspected violations in their field of competence.

In German law, § 19 paragraph 1 AEntG regulates the employer's duty to note any information of significance to the calculation of wage and holiday entitlement, i.e. information about who worked when and where. The same holds for activities within

⁸⁴ In the French report, a representative of the Polish embassy in Paris confirmed that Polish law does not require a financial guarantee from TWAs.

temporary agency work. § 19 paragraph 2 AEntG lays down the type of documents the employer has to keep available so the controlling authority can check compliance with working conditions. They have to be *kept for two years*, they must be presented in the course of inspections, and they have to be *in German*. Covered are employment contracts or the documents which were drawn up in the home country after *the national implementation of Directive 91/533/EEC* on an employer's obligation to inform employees of the conditions applicable to the contract. Additionally, work performance records, wage slips and effected wage payments are included. ^{These} documents have to be kept in Germany for the period of service delivery. § 18 paragraph 1 sentence 3 AEntG compels employers to report immediately every change of content compared to previous notifications pursuant to § 18 paragraph 1 sentences 1 and 2 AEntG. No duty exists to keep the records permanently at the place of work. In accordance with § 19 paragraph 2 sentence 2 AEntG, the records in terms of § 19 paragraph 1 AEntG shall be kept available at the workplace at the controlling authority's request. According to a Federal Ministry of Finance statement, carrying the report or a copy may make the proof of existence easier and save time. According to § 18 paragraph 1 no. 5 AEntG, the foreign employer must, in line with the registration, appoint a *responsible agent* (verantwortlich Handelnder).

In Luxembourg it is not necessary to send complete posting work information (PWI) every time. Only the company that is posting workers to Luxembourg for the first time, or whose name or legal status have been changed, has to send a complete declaration to the Labour Inspectorate. For this so-called light declaration a fax or e-mail declaration is sufficient from the second time onwards, provided it contains the following information: company name; list of posted workers; duration of work; place of work provided.

According to Article L. 142-3 of the Labour Code (since the Law of 11 April 2010), The employment documents regarding their posted workers that service providers established in other Member States have to keep in the workplace in the host state are the following (listed at the end of the posting notification form): copies of the contracts with temporary work agencies; certificate of prior declaration for occasional and temporary services on the territory of Luxembourg (copy) issued by the Ministry of Small and Medium Sized Undertakings and Tourism; E101 forms (copies) providing information on membership of social security network in country of origin during their stay in Luxembourg; VAT certificate (copy); *Conformal certificates to the directive 91/533 EC*, or the written working contracts (copies are sufficient) of the posted workers.⁸⁵ The Chamber of Commerce in Luxembourg criticized these information obligations as too far reaching.⁸⁶

⁸⁵ It should be noted that two documents provided by the Labour Code (certificate of compliance on the part-time work and fixed-term employment and document relating to qualifications of posted workers), are not included under Part V of the posting reporting form, and are in practice not claimed by ITM. It should be noted that these documents and the documents pursuant to Dir 91/533 were added to the list of documents to be submitted to ITM by the Act of April 11, 2010, following their suppression from the list of public policy provisions of the part-time work and fixed-term employment provisions. According to the national expert a problem could arise if the authorities in the sending country refuse to issue such documents, which may perhaps not be covered by their legislation.

⁸⁶ Opinion of the Chamber of Commerce January 12, 2009, relating to Bill 5942, which led eventually to the Act of April 11, 2010, p. 7: the law also requires the sending company to make available to the ITM a

Self-regulatory duties on service providers

In the UK the ACAS report on the East Lindsey dispute has identified an enhanced role for the independent NAECI auditor as one way of helping to overcome some of the difficulties that the dispute raised. In the aftermath ACAS facilitated the introduction of an arrangement relating to the transparency of the wage payments of the Italian subcontractor IREM with a view to ensuring that the NAECI rates were applied. According to a written document dated 26 March 2009 outlining the terms of the arrangement for strengthening the role of the independent auditor, IREM would (1) provide the auditor with documents relating to the number of hours worked in the calendar month (presumably by each worker), the number of overtime hours worked, the NAECI grade, and any proficiency payments. (2) The auditor would receive IREM pay slips, with gross pay levels to be checked by the auditor to ensure they were equal to the NAECI and any local agreements. (3) IREM would continue to provide the auditor with monthly details of all gross and net payments made to all their workers on the project, this information to take the form of a full, certified listing of all individual gross and net payments made to all individuals by IREM's bankers. This latter information was to include copies of all itemized pay slips; the bank account, sort code, names, amount deposited, and date of payments; and certification by IREM bankers on original, headed bank notepaper with a signed hard copy provided. It seems that these extensive audit provisions for service provider IREM have now been imposed on all subcontractors in the new NAECI agreement.

In Denmark some collective agreements also include a provision that foreign service providers must provide pay receipts and employment contracts or documentation of the terms of employment on request to the local branch of the trade union. It is not clear how common this collective agreement provision is. In Italy, the Construction Industry Sector Collective Agreement (Art.14) stipulates the duty of both the recipient and the contractor to inform the RSA or local units of trade unions about contracting and subcontracting. This allows the trade union to gain knowledge of the presence of foreign contractor companies. However, the duty is often circumvented since breaching it involves no sanctions.

Duties on posted workers

First of all, posted workers may be appointed as a representative of their posting employer (existing in Germany, France⁸⁷ and Luxembourg). In Italy, a service provider is not required formally to designate a representative in the host State. Nevertheless, if a

VAT certificate issued by the Luxembourg Tax Administration, which is a document that is not part of social legislation. The requirement to submit these documents lies beyond the scope of ITM's control. Its control should be limited to the respect of the core protective rules by the sending company. The requirement to submit official documents certifying the qualifications of employees is not justified, either. The enforcement of these provisions from the Community is already assured by the authorities of the sending Member State. These procedures slow down the procedures for posting in a manner that is beyond the scope of the Directive, which hinders the free provision of services. They also have the effect of establishing, at the level of Luxembourg state, an additional control on the enforcement of community law in other Member States of the European Union.

⁸⁷ The service provider may choose whether to appoint one of its posted employees or the service recipient.

contract is concluded, the provider should charge one of the posted workers with employer's managerial authority (and therefore designate this worker as his representative) otherwise it would be regarded as an unlawful posting, (as explained above in section 2.3), sanctioned by attributing the employment contracts to the user undertaking.

Besides to this, in Germany, § 17 AEntG in conjunction with § 2 a SchwArbG lists all documents the posted workers must carry. In branches such as e.g. construction, the restaurant and lodging industry, the shipping, transport and logistics industry, the meat processing industry, and the cleaning industry, employees are obliged to carry their identity card, their passport or a passport substitute. This obligation applies to domestic as well as foreign employees.⁸⁸ Employers must inform their employees about this obligation (§ 2a paragraph 2 SchwArbG). Other additional documents must not be carried. This is also true of the E-101 form. Nevertheless, the spokesperson for the Federal Finance Department West (Bundesfinanzdirektion West) advises employees to also carry the E-101 form, and a work permit in case one is needed, since this would simplify and accelerate inspections, which is advantageous to all persons concerned.

In Luxembourg, one of the posted workers may be charged by the sending company to make the following documents available to the ITM, according to article L. 142-3 point 5 of the Labour Code: either a certificate of conformity with Directive 91/533/EEC of 14 October 1991 concerning the obligation of employers to inform employees of the conditions applicable to the contract or employment relationship, as implemented by the legislation of the competent State, issued by the supervisory authority competent in the country in which the posting undertaking has its seat or ordinarily provide its services; or a copy of the employment contract or of the documents referred to in the above legislation. In Belgium, according to the website of FPS, every posted worker must report within eight days of arrival to the municipal administration of the place where he is staying in Belgium, unless he is staying in an hotel.⁸⁹

Duties on the recipient of the service (client and/or user company)

Recipients of the service in Belgium have to check whether foreign service providers, notably in their role as foreign subcontractor(s), have complied with the Limosa declaration obligation. They have to ensure that these subcontractors are in the possession of the L-1 as a proof of declaration. In case of absence, the Belgian user undertaking has to report this to the National Office of Social Security, the authority to which the declaration of posted workers has to be submitted in the first place. If the service recipient reports the absence of the L-1, he is freed of liability. If the service recipient fails to do so, he risks a fine (between € 250 and € 2500, multiplied by 5.5). The fine is multiplied by the number of workers for whom he did not comply, up to a maximum of € 125,000. The labour inspection services state they are lenient in the control of compliance of the service recipient with his co-responsibility to monitor the Limosa declaration. Immediately after the introduction of the mandatory declaration, inspection

⁸⁸ The obligation applies as of 1 January 2009 replacing the obligation to carry the social security card (§§ 95-109 SGB IV old).

⁸⁹ <http://www.employment.belgium.be/defaultTab.aspx?id=6196>

services charged service recipients for non-compliance in order to create awareness of the obligation and stress the responsibility of the Belgian undertakings, but non-compliance is hardly ever sanctioned nowadays: the Belgian users just receive a warning in most cases.

As stated above, from 1 June 2010 on, service providers from other Member States must also provide documentation of their registration with RUT *to the recipient* of the service in Denmark, in case the service involves construction, forestry or horticulture. The recipient is responsible for informing the Working Environment Authority if he has not received documentation of the service providers' registration with DCCA within three days after the provision of services has begun, or if the information provided is incomplete or incorrect. He may be fined in case of non-compliance.

Italian trade unions do sometimes act towards the user undertaking, notably in the construction sector where the collective agreement states the duty of the recipient to inform workers representatives about the posting.

From Sweden, examples were reported where *local authorities* as recipients of services in the context of public procurement collect certain information from their contractors. One of them is the municipality of Nacka south of Stockholm, which, in order to prevent undeclared work, includes in all its contracts for building works a clause that obliges the contractor and its subcontractors to report regularly how much they have paid to the Tax Agency for each individual worker. This does not specifically apply to posting companies, but for contractors and subcontractors regardless of nationality. A foreign service provider whose workers are not subject to Swedish tax or social security has to report how much it has paid to the competent authorities in its home state. A contractor or subcontractor that does not fulfil this obligation will have to pay a fine for each occasion and each worker that has not been reported. To make the system more effective, the municipality also cooperates with the Building Workers' Union and the Swedish Construction Federation, which have created a joint system for ID control where only workers with a special identification card are allowed access to the work site.

Duties to provide information on the recipient of the service in the construction sector were mentioned in the reports on Denmark and Italy, for example, stemming from the general legislation on Health and Safety (D.lgs 81/08). Most of these derive from the implementation of Directive 92/57/EEC on minimum safety and health requirements at temporary or mobile construction sites and may/should therefore also exist in other Member States.

4.4 SPECIFIC COMPLIANCE AND ENFORCEMENT TOOLS

General remarks

In this section we pay attention to possible specific preventive and/or repressive *tools* used for (furthering) the level of compliance to the PWD as regards pay et al. (also referred to in section 2.2 above). In five of the nine predominantly host countries (Belgium, France, Germany, Italy, the Netherlands) in our study legal (sometimes combined with self-regulatory) mechanisms of ultimate liability, in particular joint and several liability schemes concerning the clients/main contractors/user companies, are in place in the subcontracting field in order to prevent the non-payment of wages (all but BE), social security contributions (all) and fiscal charges (BE, FR, NL, partly DE). In case of cross-border subcontracting the entitlements of posted workers are in principle protected by these rules. As part of, or in connection with, the liability arrangements in these countries, several tools have been developed to either prevent the possibility of liability among the relevant parties or to sanction those parties that did not follow the rules. The *preventive tools* in place may be divided into two main categories: (1) optional (BE, DE, IT, NL) or obligatory (FR) measures seeking to check the general reliability of the subcontracting party; (2) optional (IT) or obligatory measures (FR, DE, NL) aimed at guaranteeing the payment of wages, social security contributions and wage tax. Parties that do not abide by the rules regarding the liability arrangements may be sanctioned through a number of *repressive tools*, namely: back-payment obligations (DE, FR, IT, NL), fines (BE, DE, FR) and/or alternative or additional penalties (DE, FR, IT). For an extensive explanation of the systems we refer to the study 'Liability in subcontracting processes in the European construction sector' published by the European Foundation for the Improvement of Living and Working Conditions (Dublin Foundation) in 2008. One of the findings of this study was that the liability rules in the Member States under study largely fail to have an effective impact on fraudulent situations and abuses of posted workers in cross-border situations of subcontracting and temporary agency work. Only the German liability arrangement on wages, holiday and social fund payments was assessed as a possible exception in this respect. Below we give only a brief account, based on the reports of our national experts, including any new measures from 2008 on, such as the liability of user companies in the Netherlands for the payment of statutory minimum wages by temporary staffing agencies from 1 January 2010.

However, before doing that we first give a brief account of the situation in the other countries covered by our study. In this regard, it is interesting to note the existence of similar tools in two of the other countries studied.

In Sweden there is no statutory chain liability but the legislator has entrusted the trade unions with a functional equivalent (preventive) tool in the Co-determination Act (already mentioned in section 2.4): the right of trade unions to negotiate and possibly veto the engagement of a certain subcontractor by an employer, provided they are both

bound by a collective agreement for the work in question.⁹⁰ During the negotiation the employer has to give the trade union information about the intended contractor and the conditions under which its employees work, their education in work environment issues, rates of pay, tax conditions and other information that the trade union may need to decide whether the contractor is an employer that fulfils its duties to its employees and society at large. If the trade union is convinced that the employer's plan to engage the contractor would, if it goes through, entail violations of legislation or a collective agreement by which either the employer or the contractor is bound, it has the right to enter its veto. A typical example of a situation that would justify a veto is when the employer wants to engage someone who is formally a self-employed person to work under circumstances which in fact imply that he or she is an employee.

In sectors where subcontracting is frequent, the social partners have agreed on *simplified procedures* that may be used as an alternative to the statutory procedure. The individual employer makes up a list of contractors it may want to engage. After having made a number of checks specified in the collective agreement to verify their reliability, the employer hands over the list to the trade union, and as long as the trade union does not object the employer is free to engage any of these contractors without having to negotiate every time. This possibility to free itself from the duty to negotiate gives the employer an incentive to select reliable contractors – and contractors who are bound by collective agreements. It is true that the trade union cannot veto a contractor only because it is not bound by a collective agreement, but it will not be accepted on the list (unless it is a genuinely self-employed contractor without employees). Thus, if the employer wants to engage a contractor that has no collective agreement, it has to follow the more cumbersome procedure laid down in the Co-determination Act.

In Luxembourg, too, there seems to be no real liability mechanism in place, but there is at least one alternative arrangement to protect and enforce agency workers' rights. This tool may possibly also be effective in cases of 'labour-only' subcontracting. Here, a mechanism is in place to protect workers' rights in the situation that the rules on temporary agency work and staff leasing are not fulfilled. In that case the user undertaking and the agent who places the worker at the disposal of the user are jointly *responsible* for payment of wages, allowances and related social and tax charges.

No system of ultimate liability exists in the United Kingdom, nor any functional equivalent. However, as already mentioned, the protection of workers' rights in cross-border subcontracting was the subject of a wave of unofficial industrial action in 2009. In this context, unions have campaigned that service contracts should only be awarded to contractors prepared to honour the terms of established collective agreements. The most notorious example was the dispute involving posted workers at the East Lindsey Oil Refinery.⁹¹ This dispute gained wide national and international media coverage and was resolved – ad hoc – by extralegal dispute resolution tools. The expectation is that

⁹⁰ See Kerstin Ahlberg's Swedish report and working paper: - The Age of innocence – and beyond, Oslo, Formula project, September 2010.

⁹¹ See for instance the account of this case in the working paper of Tonia Novitz - UK implementation of the Posted Workers Directive 96/71, Oslo, Formula project, September 2010.

attention to workers' rights in relation to international subcontracting will be maintained in the coming years, since currently the largest construction projects in Europe, with activity likely to reach a peak of 20,000 available jobs, are in progress in the UK, in relation to preparations for the upcoming Olympic Games. The so-called National Agreement for the Engineering Construction Industry (NAECI), was recently renewed (for the years 2010-2012)⁹² and some of the monitoring and enforcement tools it contains are aimed at the recipient of the service: (1) to ensure full transparency in the use of non-UK-based contractors, the managing or major contractor (as appropriate) must ensure that there is 'meaningful consultation' with local trade union officials at 'the earliest opportunity' to discuss the new contractor, including the resourcing strategy to be pursued. It is stated explicitly that the managing or major contractor (as appropriate) will not permit a situation to occur 'whereby non-UK labour has already mobilised to a site before the trades unions have been formally advised in a reasonable timescale'. In the event of a non-UK contractor being chosen for a particular project, the managing or major contractor (2) 'should seek clarification and assurances' in order to ensure that the non-UK contractor is aware that 'the project requires all in-scope labour'⁹³ to be directly employed under the terms of NAECI'. Steps should also be taken to ensure that the contractor 'understands their obligations under the NAECI and if necessary use the services of ECIA'⁹⁴ regional representatives to reinforce this'. It is also provided, moreover, that it is 'a requirement that the hourly pay rates, allowances etc of non-UK labour are fully compliant with NAECI (and this will be transmitted to the workforce in an understandable form), which will ensure parity of terms and conditions of employment. The non-UK contractor will also be made aware of the content of the SPA and comply with its contents (including site auditing provisions and payroll audit)'.

Thus, from the host countries in our study, it seems that only in Denmark (with the exception of safety and health at construction sites) is the recipient of the service not required to investigate whether the service provider runs his business in conformity with labour law, social security or fiscal law (in the sending state), nor is he threatened with any sanction in case of a service provider that does not pay wages or otherwise violates labour regulations.

From countries EE, RO, PL, as well as B, NL, DE and FR, in their role as a *sending country*, it was reported that companies established on their territories which provide services in another Member State through the posting of workers have possibilities to prove (on demand, for instance by the recipient of the service) with the help, for instance, of information deriving from the central trade register (DE: Gewerbezentralregister) or the Commercial register (EE), that they run their business in conformity with social security legislation or fiscal law in their country. Clearance certificates from the respective area of responsibility are issued, inter alia, by the social insurance agencies responsible for issuing E-101 Forms, the SOKA-Bau (DE) and other (sometimes sectoral)

⁹² The full NAECI agreement can be downloaded from:

http://www.njeci.co.uk/index.php?option=com_content&task=view&id=27&Itemid=43

⁹³ Within the personal scope of the NAECI agreement, see Art. 1.3, e.g. covering engineering construction projects, repair and maintenance and minor modification work.

⁹⁴ Employers' association party to NAECI.

certifying bodies. In Poland, for instance, it is possible by verifying the work agency with an association or organization to which it belongs, and through the register of the work agency, but obtaining a certificate does not entail any conditions or costs – anyone can get one.

Overview of national liability arrangements on pay and social/fiscal charges

To ensure the payment of social security and fiscal contributions, a special scheme exists with regard to (sub-) contractors in Belgium. This scheme is only relevant to specified construction works. As the fiscal component has quite recently been the subject of a decision of the Court of Justice,⁹⁵ the entire system – both the social security and the fiscal part – has been reformed. After the reform, the system consists of a “worksite notification”, a “deduction obligation” and “several liability”. The “worksite notification” is an obligation on all Belgian users to report all the contractors and subcontractors who are active on a certain worksite. This has to be done electronically. The deduction obligation consists of a duty of the user to deduct 35 % of the bill he has to pay to his contractor in order to transfer this to the National Social Security Office (this deduction is not due if the amount of the bill does not exceed € 7143). For fiscal debts the deduction is limited to 15% of the bill. However, this obligation only applies if the contractor has “social and fiscal debts” in Belgium at the moment the bill is paid. When the contractor is an employer who is not established in Belgium, the deduction does not have to be executed if he has no social debts in Belgium and if all his posted workers are in the possession of a valid posting form E101/A1. Finally, a system of several liability closes the circle. If a user engages a contractor who has social debts at the time the contract is concluded, he is severally liable (to a certain maximum) for the social debts of his contractor. The same goes for the contractor and his subcontractors. In the context of cross-border subcontracting in the construction industry, this means that the Belgian user will have to check whether the posted workers of the service provider are all in possession of the posting form E101/A1 and whether he has social debts (at the Social Fund for the Construction Industry). It should be noted that the L-1, the proof document of the Limosa declaration, is completely irrelevant to the system of deduction and several liability.

Belgium does not have a system of (chain) liability for the payment of wages. One has been under debate in the last couple of years, but the debates have never resulted in a concrete legislative proposal. The most prominent objection concerns the difficulty, also from a commercial perspective, of Belgian undertakings establishing what should be considered “low prices” in their core business. Whereas the several liability for social security and fiscal debts is manageable for employers, as they can easily check these debts online, this is not the case for wage payment liability. Employers believe it is a dangerous path to burden them with responsibility to compare prices, especially in cross-border situations when it is sometimes difficult to discover where the price reduction

⁹⁵ Case C-433/04 *Commission vs. Belgium* [2006] ECR I-10653.

comes from. To establish that a low price equals fraud would be an incorrect point of departure, and vice versa.

In France,⁹⁶ clients are made (jointly) liability for the payment of salary, social security contributions and taxes etc. Exoneration is possible if the client makes certain verifications at the conclusion of the contract and then again every six months. According to article D.8222-7 *Code du travail*, verifications are deemed to have been made if the client obtains: a) a document stating his contractor's Inland Revenue registration number and in case he has no such thing in the country of origin, his name and address or those of his tax representative in France; b) a document stating that he is up-to-date with the payment of social security contributions on behalf of his workers; c) a certificate of registration or other document certifying his inscription with the registrar of companies; and d) a declaration "in honour" that workers posted for a period longer than a month receive a payslip containing all legally required information. All these documents must be drawn up in French or translated into French (article D.8228-8 *Code du travail*). However, article L.8222-4 *Code du travail* also stipulates that when the service provider is established abroad, legal obligations which must be complied with at the date of the contract's conclusion resulting from the applicable legislation in the country of origin with "equivalent effect" will be applicable in France in regard to the specific service provision. If the client does not make any of these verifications and his service provider is found guilty of having recourse to undeclared work (article L.8222-2 *Code du travail*), then the client will be jointly liable with the service provider for the payment of taxes, social security contributions and salaries owed to the workers involved. His liability will be proportionate to the value of the service provision (Article L.8222-3 *Code du travail*). He will also be obliged to reimburse any public subsidies he might have received. In addition to this, articles L.8222-5 and L.8222-6 *C.trav.*, put in place an "alert procedure". When a control agent, trade union, professional association or elected representative informs the recipient in writing that a subcontractor, regardless of his position in the subcontracting chain, is in breach of his declaration obligations, the client must oblige his contractor to put an end to the illegal situation. If he does not do so he is jointly liable with his contractor for the payment of salaries, taxes and social security contributions. If the subcontractor of a public authority refuses to put an end to the illegal situation, the public authority is entitled to end the contract immediately.

The client might also engage his liability for the payment of salaries, annual paid leave, social insurance, accident and sickness benefits on behalf of his service providers' workers in case of "marchandage" (article L.8231-1 *Code du travail*). "Marchandage" is an offence that occurs when the contract for services, concluded between the client and the service provider, causes detriment to the workers of the latter due to the non-application of law provisions or a normally applicable collective agreement. According to article L.8232-3 *Code du travail* the client will be liable for the payment of salaries, paid annual leave, social insurance, accident or sickness benefits in case the service provider defaults on payment. The offence of "marchandage" is punishable by two years'

⁹⁶ Apart from other obligations re. undeclared work and work involving migrant workers, and a non-sanctioned obligation regarding the responsibilities of main contractor/ultimate client in subcontracting processes.

imprisonment and a fine of € 30,000. In addition, the competent jurisdiction might impose a prohibition on subcontracting for a period from two to ten years, and publication of the conviction. As far as temporary agency work is concerned, the user undertaking has the duty to request the “authorization code”, which must be indicated in the contract, under pain of nullification (Art. 21). If the Agency is established in another Member State the user company should ask for the code of the (equivalent) authorization delivered in the home country. Checking that the Agency is a genuine undertaking is necessary to avoid sanctions provided for unlawful use of temporary agency works.

In Germany, according to § 14 paragraph 1 AEntG, a client or any contractor is liable for the obligations of his subcontractor with respect to the payment of minimum wages in line with § 8 AEntG and the social insurance contributions. This is a strict liability regardless of culpability (*verschuldensunabhängige Haftung*) vis-à-vis the whole chain. Hence, the liability of the main contractor (*Generalunternehmer*) is extended to all subcontractors. The principal is only liable to the extent of the net wage (§ 14 sentence 2 AEntG). Overtime is also included, since overtime does fall under the employment conditions mentioned in § 5 no. 1 AEntG. An exemption from this far-reaching liability is possible after an inspection as to whether the chosen (sub-) contractor runs his business in conformity with labour law, social security legislation or fiscal law.⁹⁷ If foreign posted workers are not taxed in Germany, the provider – subcontractor or temporary work agency – may apply for an exemption certificate. If the provider does not apply for an exemption certificate and the recipient – principal contractor or user company – withholds the tax on compensation for construction work, the provider can apply for a tax refund. If an exemption certificate has been submitted, the principal contractor is only liable if it could not trust in the legitimacy of the exemption certificate, because it was obtained by unfair means or false statements and the contractor knew this or did not know it due to gross negligence. According to § 23 paragraph 2 AEntG, the principal provider of a considerable volume of services may in that case be penalized by a fine of at most € 30,000.⁹⁸

In the construction industry there is a so-called ‘early warning system’ (*Frühwarnsystem*) at the SOKA-Bau, according to which information may be provided about earlier experiences with subcontractors. An inspection of whether the chosen (sub-) contractor runs his business in conformity with labour law, social security legislation or fiscal law in Germany is a preventive tool that may exonerate the principal. Besides this, there is in the construction industry also a so-called pre-qualification method (*Präqualifizierungsverfahren*) for construction undertakings regarding the award of public services/works contracts (*Vergabe von öffentlichen Aufträgen*). Private house builders may also benefit from these methods. According to IG Bau, large construction undertakings retain as a preventive measure, temporarily, 20-25% of the sum agreed with the authorized subcontractor. Thus, undertakings can protect themselves from bad

⁹⁷ For the less far-reaching systems of liability for social security charges and fiscal charges, see the Dublin study 2008.

⁹⁸ If, however, the principal fails to comply with this preventive measure, this behaviour may constitute an offence (*Tatbestand*) within the meaning of § 23 paragraph 2 AEntG, which may be punished with a fine up to € 500,000 in the sense of § 23 paragraph 3 AEntG.

performance or warranty claims. Additional protection is also provided in case the subcontractor does not comply with the minimum employment conditions and the undertaking will be held liable in line with § 14 AEntG. The money will be kept, generally, until the construction work has been completed or until the limitation period within the meaning of VOB/A has lapsed, viz., two years. In Germany, liability provisions for tax obligations are only applicable in the construction sector.

In Italy, joint liability is provided both by the law implementing PWD and by the law regulating the conditions of employment of workers posted in the context of subcontracting. The law implementing the PWD provides for the recipient's joint liability (Article 3, par.4). Posted workers can take action against the recipient within one year after the end of posting in defence of their rights; in case of an "internal" contract (executed inside the receiver's undertaking), no time limit exists (Article 3, par.3). Nevertheless, the "general" regulation on joint and several liability in case of contract (referred to "national" contracts) was reformed in 2003 (by D.lgs.276/03), extending the liability of the principal contractor also to all the "subcontractors" (covering the chain of contracts), within 2 years after the end of the contract, but limiting the joint liability only to remuneration and social security contributions. It is not clear if this provision should also apply to transnational contracts. If the rule fixed by the Law of 2000 is regarded as still applicable, inasmuch as it is a special rule, the joint liability of the recipient should be limited to the "first" contractor and it should not be extended to the entire chain of contracts; posted workers who work outside the recipient's plant can take action against him within one year after the end of the contract, instead of two years, as the general rule states. Consequently, from this point of view, for user undertakings the special regulation of transnational contracts would be less onerous than the general one. Posted workers would, however, receive greater protection than national workers because joint responsibility would involve all their credit rather than being limited to retribution. However, as a practical standard procedure, inspectors deem that D.lgs. 72/2000 is implicitly repealed by art. 29 d.lgs. 276/03, so they consider the recipient employer jointly liable with the foreign contractor and each subcontractor, limited to the payment of retribution, within two years after the end of the contract.

In the Netherlands the 1982 Wages and Salaries Tax and Social Security Contributions Act (Liability of Subcontractors – *Wet Ketenaansprakelijkheid*) provides that the main contractor is liable for social security contributions and income tax. The primary goal of this Act is to combat unreliable subcontractors. The main contractor is not only liable for the first subcontractor but for the entire chain of subcontractors who follow down the line and who are at work on the same project at the building site. The second goal is to combat unfair competition. In order to limit the risk of liability for social security contributions and wage tax, user companies or contractors may use the following self-regulatory tools: screen the supplier or (sub-) contractor; use a so-called guarantee account or 'G-account' (recently changed into a deposit system); or pay directly into an account of the Inland Revenue. Furthermore, the recipient/user company may choose an accredited temporary work agency. User companies and contractors that use the deposit system for the payment of social security contributions and wage tax are protected against liability for the portion paid. The screening beforehand of the (sub-) contractor or

supplier of staff and the choice of an accredited temporary work agency will obviously limit the risk of liability, but does not legally limit or prevent the liability of the (principal) contractor or user company. In domestic situations, this liability arrangement works quite well. However, it should be noted that when foreign subcontractors are at work with posted workers, no social security contributions and income taxes are due for the first 183 days of labour. In these cases the Act does not apply.

With regard to labour law, from 1 January 2010 liability exists for the wages of temporary agency workers (including posted workers) in user companies that make use of *non-certified* temporary work agencies. The liability is limited to the statutory minimum wage level. This legislation is meant to encourage the use of so-called NEN-certified temporary work agencies. This liability also applies to users of *foreign* temporary work agencies and is thus also meant to serve as a tool to enhance compliance with the host's labour standards by foreign service providers. The German example played a role in the Dutch parliamentary process, where reference was made to the Wolff/Mueller judgment of the ECJ in 2004 in an analysis of the compatibility of this measure with obligations under EU law. Liability for wages is a new tool of labour law enforcement in the Netherlands. It fits in with the trend towards further compliance without (too much) administrative ado.

It was estimated in 2006 that about two-thirds of the temporary work agencies which operate in the Netherlands are fraudulent. Therefore, the certification of these agencies with a quality mark, known as NEN norm 4400, granted by the National Standardization Institute (Nederlands centrum van normalisatie, NEN) was established by the agencies industry itself. The first NEN norm applies to agencies established in the Netherlands, but a second norm regarding temporary work agencies established abroad was also issued in 2008. To encourage the use of accredited temporary work agencies, more and more generally applicable CLAs oblige the employer to contract a qualified agency.

Other related measures (including self-regulation)

In Italy, no sanction is provided by the law in case of non-compliance with minimum rates of pay fixed by CLA. For this reason the inspectors are devoid of powers and legal instruments by which to contest violations of the right of the posted workers to a minimum wage. A recent reform of the system of labour inspectorates establishes that if the employer has failed to comply with payment obligations, the labour inspector can adopt a “warning act” (*diffida accertativa*) against him (Article 12, D.lgs.124/04); the employer can pay or ask to open a conciliation procedure before the Local Labour Authority (DPL) in order to find agreement on the payment with the worker. Otherwise, after 30 days the worker can start an executive judicial procedure against the employer upon the inspector's assessment. When the employer is established in another Member State, enforcing this proceeding is quite difficult (and indeed rarely attempted), because the employer must be notified of the warning act in another Member State and also because worker's credit must be certain, liquid and payable.

Social clauses in CLAs

In Italy and the Netherlands, similar social clauses (also referred to in section 2.3) to those in the UK NAECI agreement are implemented in CLAs, obliging contractors and subcontractors to comply with the national collective agreement.

Sometimes, before executing a contract, an agreement with the Italian firm is concluded, compelling it to make the foreign undertaking and its employees join the construction fund and apply the collective agreement. Similar agreements have been stipulated in relation to contracts involving undertakings established in a third country, which also favours the prior communication to trade unions.⁹⁹ The contractors must also give the recipient a statement of the yearly personnel, divided according to qualifications, the document attesting to the lawful social security situation of posted workers (*Documento Unico di Regolarità Contributiva: DURC*) and the collective agreement applied (Art.90, par., lett. b). Foreign contractors have the obligation to maintain the DURC in relation with the duty to contribute to the construction funds if equivalent obligations are not imposed by the law of the home State, as clarified by the Ministry of Labour in its interpreting acts (see supra C1). In this case, too, the labour law inspectors can ask for these documents from the recipient. If they are not produced, the competent Authority (Municipality) suspends building permission (Art. 90, par. 9 lett. c.).

In the Dutch CLA in the Construction Industry, from 2000 on a social clause has been incorporated, which was not declared generally applicable until 2007. Therefore, in that period, the social clause only covered employers or principal contractors who are members of the employer organizations that are party to the CLA. Since 2007, the social clause has become generally applicable, obliging all principal contractors in construction to contract subcontractors only on the condition that they apply the provisions of the CLA to their employees. However, the repercussions in case of non-compliance with this obligation by the principal contractor are not stated. In some situations they might be held liable through tort law, according to Article 6:162 of the Civil Code. In practice, no legal cases have occurred so far.

Public procurement

Germany: Pursuant to § 21 paragraph 1 AEntG, applicants for the award of public works or services may be excluded in case they were punished in line with § 23 AEntG with a fine of at least € 2500. This exclusion will last for an appropriate duration and until the reliability has been demonstrably be restored. This applies both to domestic and foreign undertakings.

Chapter 10 Section 2 of the Swedish Public Procurement Act allows the contracting authority to exclude a supplier, regardless of its nationality, from the participation in a procurement if the supplier has not fulfilled its obligations relating to social insurance charges or tax in Sweden or in another country, or if the authority can prove that the supplier has been guilty of grave professional misconduct. This last could include non-

⁹⁹ For example, the agreement concluded in 26 March 2010 between Unieco soc.coop. and Fillea-CGIL of Reggio Emilia.

compliance with labour legislation. As the text reveals, this is an option for the contracting authority, not a duty.

4.5 LEGAL REMEDIES AND OTHER AVAILABLE SUPPORT FOR POSTED WORKERS

The subject of this section is first of all the legal remedies for posted workers and/or their representatives to enforce the rights conveyed by the PWD. We look subsequently at the implementation of the jurisdiction clause in art. 6 PWD, whether posted workers have access to legal aid and whether they and/or their representatives actually use their right to bring claims to court in the host state.¹⁰⁰ Finally, we list other possible support mechanisms for posted workers.

Jurisdiction clause

Article 6 of the PWD stipulates that in order to enforce his rights to the terms and conditions of employment guaranteed in Article 3 of the PWD, the posted worker must have the possibility to institute judicial proceedings in the host member state, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State, such as the one where he habitually performs under his employment contract. Hence, all member states have had to ensure that workers posted to their country, covered by the Directive, can bring judicial proceedings for enforcement in the territory where they have been posted.

With the exception of the UK, the jurisdiction clause was explicitly implemented in all member states, subject of this study.¹⁰¹ In the UK, the posting situations covered and the rights derived from the PWD were not clearly defined in national law and the jurisdiction clause in Article 6 of the Directive was therefore not properly implemented. Nevertheless, EU workers¹⁰² posted in the UK can bring a claim before the Employment Tribunal for, for example, unfair dismissal, non-payment of the minimum wage or disability discrimination, as they have the same protection as non-posted workers in the UK.¹⁰³ German law stipulates that the claim of a posted worker must be related to the duration of the posting to Germany. French courts are competent as long as the posted workers' claims are not time-barred. In effect posted workers' court actions are inadmissible after five years from the date they became due for payment (article L.3245-1 *C.trav.*). In order to achieve a more rapid settlement of disputes than normal, the

¹⁰⁰ From some countries court cases were reported of service providers on matters not directly related to the PWD, but in relation to social security law – as in the French report – or in relation to allegedly excessively far-reaching obligations from a transitional regime (e.g. the Netherlands, but see also UK with regard to the interpretation of its workers' registration scheme). We have opted not to include these in this section.

¹⁰¹ As was already clear from the Evaluation report of the EC in 2003, but an infringement procedure against the UK was never initiated. See also Novitz, Formula paper 2010, footnotes 36-38. In particular, the Commission referred to two recent European Court of Justice cases, *Commission v Greece* and *Commission v Netherlands*.

¹⁰² It is not clear whether this implies the exemption of workers with a third country nationality

¹⁰³ See: <http://www.thompsons.law.co.uk/ltxt/10640005.htm>

legislation implementing the PWD in Italy provides that for posted workers the preliminary phase relating to the obligation to seek conciliation does not apply and the case shall be passed directly to the labour court (Article 6, par.2, D.lgs. 72/00). Thus, in case of non-compliance, individual posted workers can bring their claim directly to the competent Italian authorities. For the situation in the Nordic countries, where individual workers traditionally play no role, or only a minor one in claiming their rights, see below.

Locus standi for social partners

In Belgium, the jurisdiction clause was not only incorporated for the posted workers themselves, but also for representative workers' and employers' organizations, without prejudice to the right of a posted worker to take legal action himself, and to join or intervene in legal action. The representative organizations can take legal action without the authorization of the posted worker concerned (this is also possible in the Netherlands and France in their capacity as parties to the collective agreement; in such instances it is not necessary that posted workers are union members). In Belgium, they do need authorization from the interprofessional organization of workers or employers, as they need to have the opportunity to inform other interprofessional organizations to give the latter the opportunity to intervene in the legal action concerned. In France, too, even though posted workers are not often affiliated to French unions, the latter can introduce judicial action in respect of posted workers, as long as they can prove that in so doing they are acting in the the profession's collective interests (article L. 2132-3 C.trav.). This should not be difficult in practice, given that lower wages or worse working conditions on the same working site may involve social dumping.

German law stipulates that social partners (such as SOKA-Bau) may lodge a claim as well, but this independent right of action seems to be limited to the contribution they own within the meaning of § 5 no. 3 AentG (holiday payments). In Estonia, if an employer or an employer's representative does not comply with law, or fails to perform or violates a contract, the trade union (also) has the right to demand on behalf of its member(s) that the employer comply with the law or fulfill the contract or terminate the violation upon the corresponding request of the employee. Upon the corresponding request of a member of the trade union, the verification of employment contracts and collective agreements, documents concerning working conditions, working and rest time and work regimes, wage conditions, bases for payment of wages, occupational safety, social insurance payments or making of payments all fall within the competence of the trade union.

In Denmark, to the extent that there is no collective agreement, posted workers as well as those working permanently in Denmark can obtain legal remedies in the civil courts. However, most workers' rights are protected by collective agreements. With regard to claiming these rights, only the trade unions and employer associations have standing to bring cases to industrial arbitration, since they are the parties to the collective agreements. This means that if a worker is unable to persuade the trade union to bring a case to industrial arbitration, there is no legal remedy. A similar system applies in Sweden, where a person who is not a member of the contracting trade union cannot invoke a collective agreement against the employer. Thus, even if a foreign service

provider is bound by a collective agreement with a Swedish trade union, normally the posted workers themselves will not be able to enforce – for example – the rates of pay etc. under this agreement in a Swedish court.¹⁰⁴

In Denmark this system is mitigated by the rule that where legal rights deriving from an EU directive are concerned, both individual workers and employers are permitted to bring their cases before the civil courts. In Sweden the Committee that had to propose measures as a result of the Laval judgment concluded that the existing situation was contrary to EU law and recommended that posted workers should be given a special right to claim terms and conditions according to Swedish collective agreements, even if they are not members of the signatory trade union. However, the Swedish Labour court and one of the leading employers' organizations objected, the latter pointing out that such a rule would discriminate against foreign employers. The Swedish Government listened to these objections and the proposal was never passed. Nevertheless, in practice the rights of non-unionized posted workers stemming from the collective agreements will be enforced in the same manner as they always have been enforced for non-organized workers in Sweden, viz., by the Swedish trade unions. This tradition is based on the trade unions' conviction that it is in their own interest. Therefore, an employer who is bound by a collective agreement is obliged to apply at least its minimum conditions to non-unionized workers as well. This does not follow from legislation but is an obligation *towards the trade union*, implied in the collective agreement itself and with the purpose of preventing undercutting of the collective agreement.¹⁰⁵ Employers who do not respect this obligation are regularly confronted with claims from trade unions. The Building Workers' Union in particular closely monitors what the employers pay their workers. Nevertheless, it is true that, before the Labour court, the trade unions are by law not permitted to act directly on behalf a non-member. Thus, if a dispute of this type cannot be resolved through negotiation, the trade unions cannot claim anything but compensation for itself for breach of the collective agreement, in the hope that this will deter the employer from continuing to breach the collective agreement. However, most labour disputes are not manifested in court cases. Parties bound by collective agreements have to try to resolve the dispute through negotiations at local as well as central level before they can institute proceedings before the Labour court, and the bulk of the disputes are resolved at that stage.

Legal aid

It was reported that posted workers (although neither domiciled nor resident in the host state) have equal access to the legal aid mechanisms provided by law in Belgium, France, Germany, the Netherlands, Luxembourg and Sweden, as long as they are EU nationals or are regularly resident or domiciled in another member state of the EU (except for Denmark). In case of legal aid for proceedings in cross-border civil and commercial matters, this may be based on Directive 2003/8/EC of 27 January 2003 aiming to improve

¹⁰⁴ Please note that this applies only to rights following from collective agreements, not to rights following from legislation.

¹⁰⁵ In the Netherlands a similar obligation of the organized employer is laid down in law, Art. 14 WCAO.

access to justice in cross-border matters.¹⁰⁶ In accordance with the general principles operating in the UK in employment cases, no legal aid would be available for posted workers there. Posted workers to Romania, too, do not have access to legal aid there, with the exception of the legal aid that may be provided by the trade union.

An alternative to legal aid is indeed that costs of litigation would be supported by a union. This is only possible if the posted worker becomes affiliated to it. However, as was reported from several countries (e.g. Lux), such aid is usually granted to a new member only after compliance with a waiting period, which is hardly compatible with short postings.

Use of the jurisdiction clause in practice

Having a right is not the same as availing oneself of one.¹⁰⁷ Hence, there is a difference between having the possibility on paper to bring a claim to court and exercising this right in practice. In this respect, we examined whether the possibility of enforcing one's rights in court is actually used by posted workers.

In all the receiving member states, with the possible exception of Germany,¹⁰⁸ it seems that the right to take legal action has at present hardly or even never been used by posted workers nor by their representatives.¹⁰⁹ In the light of contentious cases presented in the media (see section 3.5), it is self-evident that we cannot assess this non-use as an indication of almost full compliance, but rather may interpret it as a clear signal that the jurisdiction clause of itself is not enough to provide posted workers with an effective remedy. If posted workers do not stand up for their legal rights, the legal rights are empty promises. Nevertheless, it should be noted that if a posted worker brings proceedings to enforce the PWD in a host country, in most countries this will not be recorded as such (e.g. due to personal data protection regulation, as in Poland). Thus, it cannot be entirely ruled out that a few unnoticed posted workers' cases have appeared before the courts. This lack of reliable data is a matter of concern in itself.¹¹⁰

A number of reasons were mentioned in the national reports for the (plausible) underuse of the possibility to enforce one's rights by posted workers (also referred to in section 3.5 on media cases).

¹⁰⁶ Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

¹⁰⁷ As was for instance made clear by the Advocate General Alber in a passing observation in his Conclusion on the (non-posted worker) case *Commission v Italy* about the extra difficulties a worker encounters if he were to consider pursuing a legal claim in another Member State, see C-279/00 (*Commission v Italy*), points 34-36.

¹⁰⁸ From Germany it was reported that no assertions can be made about the number and subject matter of lawsuits since no data are elicited at the employment tribunals as to which lawsuit was related to the posting of workers.

¹⁰⁹ From e.g. Belgium it was reported that trade unions encounter difficulties preparing concrete cases due to the remoteness of foreign workers and the complex collection of proof.

¹¹⁰ It would require an investigation extending far beyond the time allocated to this project to screen all available national case law related to labour standards applicable to posted workers.

(1) One reason, reported by several country reports (e.g. BE, NL, Sweden, but also confirmed by the Romanian report) seems to be that most posted workers do not tend to take legal action since, even in circumstances when the applicable rules are infringed, they are often a lot better off with what they earn while posted as compared to their wages in their country of origin and/or they are simply satisfied with having a job.¹¹¹

(2) Besides this, it was mentioned that despite persistent efforts of the trade unions and the governments in some of the countries studied (e.g. Belgium and the Netherlands) to make posted (and other migrant) workers more aware of their rights, the majority of them do not seem to obtain or even do not want to obtain this information. Thus, as a stakeholder cited in the Belgian report bluntly put it, in most cases the workers seem to prefer to make as many hours as possible and then “take the money and go”, asking no further questions. In other countries, though, posted workers may still not know what they are entitled to due to a lack of information or the poor transparency of the system (e.g. in Sweden).¹¹²

(3) It was also reported that employees do not dare to sue their employer while posted, as they cannot afford to have legal conflicts with the agency on which they depend economically. In certain situations, reported by stakeholders in Belgium and Germany, it seems that posted workers are even compelled to remain silent to trade unions and authorities in the host country about their working conditions. In an unknown percentage of cases, fraudulent posting of workers is related to a criminal environment in which the “leaders” of such fraud networks make sure that the workers involved do not get the opportunity to complain about their situation.

(4) Moreover, it was observed that posted workers are often suspicious of the judicial system in their home country and transfer this distrust to the host state courts. This may be partly a matter of simple perception, but another aspect is that there are a lot of procedural details which may act as impediments. Indeed, it is sometimes hard for posted workers to find their way in an administrative and judicial system with which they are unfamiliar. As reported from France, if the workers apply to the *Conseil de Prud’hommes* in the location where the service is provided, they will probably no longer be in France on the trial date, which will normally be six months or more later. As a result, choosing to sue their employer in France may generate additional costs, which will be not covered by legal aid. Another reason why posted workers are discouraged from suing their employer in France is that he is normally established in the country of origin, which makes it more difficult to get the employer to appear before the court than in a domestic case. Moreover, even if the employer were to appear at the trial, the judgment would then have to be executed in the country of origin, which would produce further delay. There are also serious, practical obstacles for a posted worker bringing legal proceedings before the

¹¹¹ Cultural differences also seem to play a role: Brazilian people posted via Portuguese companies are usually a lot more assertive when it comes to their rights, as was observed in Belgium.

¹¹² From Sweden it was reported that tax rules also play a role, since, for example in Poland, these can make it attractive for workers to establish themselves as self-employed, even if they are in fact employees according to Swedish labour law.

British courts.¹¹³ Apart from the costs, the delay in legal proceedings suggest that it is improbable that a ‘posted’ worker will be around long enough to engage in protracted litigation about what may be a very small sum of money.

So, as some of the national reports conclude, in practice most individual posted workers only seem to become active in case of a severe occupational accident (or their surviving relatives and/or shocked colleagues) or if no wage at all is paid and the employees cannot even pay the costs of living. In the latter cases, the direct employer may have vanished and be untraceable.

(Court) cases

In such situations it was reported from Italy that legal action by trade unions on behalf of the posted workers occurs in the construction industry, and action is then usually taken against the Italian user, according to the joint liability (see section 4.4) or because of the illegitimacy of the posting (see section 2.3). In France, (anecdotal) evidence was found that posted workers in such cases have recourse to trade unions and prefer collective action and/or negotiations above legal claims. Examples of the trade union CGT:¹¹⁴ On one occasion (March – April 2002), 25 Greek workers were posted by a Greek subcontractor (Ippokampos) to the Saint-Nazaire shipbuilding yard. As the Greek employer did not pay salaries for some time (since August 2002); the workers engaged in collective action (March 2002) and managed to recover part of their claims from the recipient company (Alstom), which immediately broke the contract with its Greek subcontractor. According to the USM-CGT website, the relevant trade union brought claims before the courts on behalf of the Greek workers, but no information is available about the final outcome.

On another occasion (June 2003), USM-CGT was able to invoke the Labour Inspectorate on behalf of 60 Polish workers posted to the Saint-Nazaire shipbuilding yard by a Polish subcontractor, a ventilation specialist. According to USM-CGT, Polish workers were faced with considerable delays in the payment of their salary; they were paid no overtime increments, and were required to work on Sundays. The intervention of the Labour Inspectorate was sufficient to ensure that the subcontractor resumed compliance with French labour law standards. The same course of action was followed by three Portuguese workers, who also pressed charges for undeclared work in February 2003.

Probably most of the court cases related to the protection of rights of posted workers under the PWD, may be found in Germany.¹¹⁵ However, even there, most requests for help are directed to the trade unions (especially IG Bau). By negotiating, the German trade union has contributed to gaining payments of back wages amounting to millions, without the courts even getting involved. None of the the other countries reported court

¹¹³ The position would be different in relation to a common law claim for damages following an accident, but no such cases were reported. Such a case could probably be brought before the British courts.

¹¹⁴ See the website of USM-CGT Saint-Nazaire.

¹¹⁵ An overview of court cases related to the posting of workers, which was drawn up with help from the relevant German legal databases, is to be found in Annex III.

cases initiated by individual posted workers or aimed at protecting the rights of posted workers. In Sweden, three cases initiated by trade unions attracted wide attention and in Denmark the so-called Galmet case, also brought by a trade union, even gained international attention, with questions asked in the European Parliament.

The three cases in Sweden involving posted workers – who were not trade union members – are all situated in the construction industry.

The first, from 2003, concerned a Slovak company which had posted around 100 furnace masons to a steelmaker established in Luleå, Sweden. The company signed a collective agreement with the Building Workers' union that would entitle the workers to SEK 137 per hour, plus supplements for holiday, overtime and work in unsocial hours. One of the workers was killed in an accident at work and the Work Environment Authority concluded that it would probably not have happened, had the employer conducted a proper risk assessment and taken the necessary preventive measures. After this, one of the victim's colleagues disclosed to the trade union that the workers were paid considerably less than the collective agreement stipulated. The Building Workers union informed the employer that it would start industrial action to recover unpaid wages. Confronted with this, the employer agreed to pay SEK 20 millions to a bank account in Slovakia, as retroactive payment of wages to the posted workers.¹¹⁶

In 2005 a Swedish company expanded its refinery in Lysekil. The main contractor engaged a subcontractor, which engaged two further subcontractors: an Italian company, which posted some 100 electricians, and the temporary work agency Vinc Placement, which posted more than 200 plumbers from Thailand. The Italian subcontractor was bound by a collective agreement with the Electricians' union and Vinc Placement with the Building Workers union. When local residents noticed that some of the Thai workers were collecting and recycling cans, it was revealed that the employers did not stick to the collective agreements. After negotiations, the Swedish service recipient itself agreed to guarantee Vinc Placement's workers the pay they had been promised, SEK 20,000 per month plus board and lodging, including their retroactive claims. The Electricians' union managed to enforce the collective agreement through direct negotiation with the Italian subcontractor as employer of the posted workers.¹¹⁷ These 2003 and 2005 cases were resolved by negotiations. At present however, a case is pending before the Swedish Labour court of posted workers who, in contrast with the large majority of posted workers, did join a Swedish trade union. In this case, the Building workers union claimed nearly SEK 200,000 (approximately € 20,000) each for 36 Polish workers posted by Rimec, a temporary work agency established in Cyprus with an Irish parent company.

The Danish Gal-Met case initially concerned a Polish service provider's failure to pay wages to its posted employees in Denmark, as determined by the Danish collective agreement to which it was a party. The case started as a complaint brought by the Danish

¹¹⁶ 20 miljoner till ugnsmurarna, www.byggnadsarbetaren.se 2003-10-08; Slovaker får retroaktiv lön, www.byggindustrin.se 2003-10-09.

¹¹⁷ Grundlurade redan innan planet lyft, Byggnadsarbetaren No 8 May 2006; Konflikten vid Preemraff löst, <http://svt.se> 2005-09-07; Thailandare på Preemraff får vänta på sina pengar, <http://sverigesradio.se> 2005-09-19; Eltvåan räddade mer än en halv miljon kronor, www.lo.se

trade union against the Polish employer. According to the applicable collective agreement, such complaints must first be dealt with through negotiation between the parties. As a result of these negotiations Gal-Met agreed to pay the wages. However, after paying the wages, Gal-Met brought a lawsuit in Poland against the employee to recover the wages paid as a result of the settlement, which claim was acknowledged by the Polish court.¹¹⁸ The Danish trade union found out about this – probably from the employees – and brought the matter to the Danish Labour Court, arguing that the Polish lawsuit was a breach of the collective agreement. The Labour Court handed down its decision on 30 April 2008 in Case no. A 2008.132. It required Gal-Met to pay 250,000 Danish kroner to the trade union as a fine for its violation of the collective agreement. It is unclear in this case whether the Polish judgment was executed on the posted workers concerned, and if so, whether this was rolled back again with or without involvement of the Danish trade union.

Legal claims in the countries of origin

This Gal-Met case brings us to the following questions: (1) how may posted workers deal with infringement of their rights after return to the country where they normally (are supposed to) work? and (2) how may courts in that state deal with such a claim based on foreign labour law?

(1) Relying on the information from the interviewees, it seems that even after the posting has come to an end, many employees are still reticent to bring legal action due to the balance between cost and the chance of success. Nevertheless, in Belgium several stakeholders agreed that Polish workers may often not complain about their situation in Belgium, but they do so when they return to Poland; according to the Belgian report, this was confirmed by Polish trade unions.

The Polish country report mentioned that temporary agency workers posted abroad sometimes decide to sue their employers (the Polish temporary work agencies). Most often these cases concern (conditions of) a contract's termination and/or remuneration for overtime. In the opinion of the interlocutors there were also court cases initiated by labour inspectorates or trade unions on the same topics, as well as the right of residence in other EU countries, social insurance, and the recognition of Polish workers' professional qualifications in other EU countries. As the 'Danish' Gal-met case shows, Polish service providers may also initiate legal proceedings 'at home' against their posted employees.

No claims of posted workers brought to the courts in their home countries were reported from the other two predominantly sending countries in our study, Romania and Estonia, or from the side of the service providers. In fact, all of the other countries in their role as a sending state (BE, NL, DE, FR) reported no court cases, either initiated by service

¹¹⁸ Probably (until 2008) due to the universal application of Polish labour law in cases with a Polish employer and a Polish employee, even if the work is performed abroad (see section 2.2. and 2.3).

providers or posted workers with regard to the rules applicable in host Member States (see below for the use of SOLVIT by service providers).

(2) In their role as a country of origin, it was reported that the Belgian, Dutch and German courts would also recognize the rights granted under the law of the host state to workers posted from their territories by honouring a (justified) claim against the employer (also established in their country). However, no experience of such cases in practice was reported. In Poland, as the Gal-met case shows, such experience has been gained in practice, but there, at least until 2008, Polish courts were not inclined to recognize the rights granted to posted workers by the law of the host state, because of the then prevailing PIL rule which imposed universal application of Polish labour law in cases with a Polish employer and a Polish employee, even if the work is performed abroad (see also section 2.2.).

Other support available to posted workers

Access to trade unions as a means of support

As is clear from the above (see for instance the court cases reported above in this section, as well as in section 3.5 on media cases), trade unions are commonly more powerful in defending the entitlements of (vulnerable) posted workers than the individual workers themselves. This finding is not very surprising, since their (collective) force to stand up for the rights of employees is historically the trade unions' 'raison d'être'. In all countries under study, posted workers are free to become a member of host state trade unions, although it was stressed that unions may themselves decide the criteria for membership, as long as they are not discriminatory.¹¹⁹ Nevertheless, for posted workers it appears to be far from common to become a member of a trade union in the host country, as was confirmed in all the country reports, although affiliation to trade unions in all host countries is possible and often actively encouraged and promoted (e.g. in BE, DK, NL, SV, UK), with union campaigns specifically targeted at posted and/or migrant workers from the new Member States.¹²⁰

The reasons behind the underrepresentation of posted workers in the membership of trade unions in the host country seem to run more or less parallel to the reasons mentioned above in this section for the almost complete failure to use legal remedies by posted workers:

¹¹⁹ Some attention was also paid to the possibility that foreign established employers can become members of employers' associations in the host state. This option has been used for instance in the German TAW sector, as employers from Austria, Poland, the Netherlands, France and the UK are members of the iGZ.

¹²⁰ Examples: projects of Dutch and Danish unions in the construction industry. As part of their campaigns, Polish-speaking consultants were hired to help the domestic trade unions communicate with the Polish workers.

- 1) No interest in becoming a trade union member because the average posted worker is satisfied with the terms and conditions of the posting, in comparison with the job opportunities and labour standards in the country of origin.¹²¹
- 2) Thus, the posted worker focuses on the chance to enhance his living conditions through the posting, and is ignorant of, or consciously disregards, signals that he may be underpaid, abused or even exploited, from the perspective of host country standards.¹²² Interviewees from the union side often mention the problem of securing access to posted workers for the purposes of recruiting them. The workers often seem to work in isolation from domestic workers and contact possibilities with trade unions or other actors in the host state are sometimes actively impeded. In the UK the problem was mentioned that trade unions have no right of access to an employer's property without the employer's consent.
- 3) To an unknown extent, the passiveness of posted workers in pursuing or becoming aware of their rights may be due to a blunt fear of standing up for these rights (such as to become a trade union member), because of their contractual weakness and economic dependency on the job opportunity provided by the employer. For example, the Swedish Building Workers' Union observed that posted workers are often afraid to speak with the trade union representatives, and there are examples of posted workers being fired when they joined the trade union. Some have requested anonymity as members of the Building workers' union, but it cannot represent anonymous members.
- 4) Moreover, posted workers originating from the new Member States covered by this study are often not affiliated to trade unions in their home country, because these organizations have not really stood up for their rights in the past. The posted workers convey this distrust to the trade unions in the host state. Moreover, from Estonia it was reported that posted workers are usually not members of trade unions because most of undertakings that send out employees are so small that there is no trade union representation/activity in these firms.¹²³ The fees for membership were also mentioned as a possible deterrent.¹²⁴

Nevertheless, there are a few success stories (visible in the cases mentioned above and in section 3.5) of legal and/or collective action on behalf of posted workers by trade unions, and in all predominantly host countries there is at least anecdotal evidence of some posted workers becoming members¹²⁵ and sometimes even active members, as in the UK,

¹²¹ Sweden: Sometimes workers do not want to have any contacts with Swedish trade unions because the tax rules of their home country, for example Poland, are very favourable to self-employed workers. Thus even if they are employees according to Swedish law, they do not want to be treated as such.

¹²² E.g. Italy, the Netherlands.

¹²³ Only 6.2 % of employees are affiliated to trade unions in Estonia.

¹²⁴ Other practical problems raised in national reports include: the case of double union membership, which could be in conflict with (home state) unions' statutes and could double the cost of union contributions (IT); limits to the possibility of a (unionized) posted worker to become member of workers' representative body within the firm (IT, FR).

¹²⁵ BE, DK, DE, NL, SV, IT: only in the construction sector have cases of posted workers being members of an Italian union been verified, when the foreign undertaking joined the construction fund. Besides this, long-term posted frontier workers were mentioned as possible union members in host country Italy.

where a posted worker was reported to be acting as a shop steward at one construction site.

Mutual recognition and assistance between trade unions from host and sending state

An alternative to membership in the host country could be provided by a cross-border system of mutual recognition and assistance to each other's members between unions. Besides the traditionally close ties with Austrian and Swiss unions, around the year 2000 in particular the German trade union in the construction industry (IG Bau) was active in signing agreements with its counterparts in Belgium, the Netherlands, Italy and Poland,¹²⁶ on the mutual support of and assistance to each other's construction workers. Although it was not reported that these agreements have been terminated, nevertheless, in practice, mutual assistance seems to be rather an exception than a rule. Apparently, only in a very few cases is there is a request for legal aid to the host state trade union from a posted worker who is affiliated to a union in another Member State (BE, NL). From France and Romania, too, it was reported that mutual cross-border assistance of unions to each other's members is officially established within the framework of membership of the European Federation of Building and Woodworkers, but in practice it seems that the system is underused and the effect on the protection of posted workers is unknown.

Since Polish trade unions have adopted the guideline that individual members leaving the country for the purpose of working abroad have to be taken care of by a trade union located in the host country, especially „Solidarność” and OPZZ – All-Poland Alliance of Trade Unions – have concluded many agreements with trade unions in other EU countries. Moreover, Polish trade unions encourage their members to join trade unions in host countries. However, in practice not many Poles working abroad do become members of the foreign trade unions, although this is slowly starting to change. Usually, workers only join trade unions when a conflict arises.

In Germany, especially in the TAW sector, active cooperation in practice was reported at the level of the organizations themselves: mutual requests seem to be usual when problems with other member states' regulations arise. Besides this, non-institutionalized contacts were mentioned, such as meetings at congresses and linkages with constant (social) dialogue.

No activity, either on paper or in practice with regard to cross-border trade union assistance was mentioned in the other country reports (DK, EE, LUX, SV, UK, IT).

Collective bargaining to secure working conditions for posted workers

In regard to the question whether collective bargaining takes place with the specific purpose of securing (better) working conditions for posted workers during their posting within the host state, the distinction between the Member States runs parallel to the differences in the system of collective bargaining, described in section 2.3 (on the use of Article 3(8)). On the one hand, such bargaining occurs in the Nordic countries DK and

¹²⁶ See for more detail, M.S. Houwerzijl, *De Detacheringsrichtlijn*, Kluwer 2005, p. 219-224.

SV, as well as in Italy and the UK – all countries without a system of extension. On the other hand, specific negotiations to improve posted workers' working conditions do not occur in countries with systems of extension (BE, DE, FR, LUX, NL, and new Member States PL, RO and EE). This is attributed to the fact that posted workers are already entitled to (core labour standards in) generally binding sector CLAs. Nevertheless, here and there specific provisions directed at posted workers can be found in Dutch and Belgian CLAs.¹²⁷

In both Denmark and Sweden, it is relatively common for some foreign service providers to (temporarily) join the relevant employer's organization. Some foreign service providers (through an application agreement) simply join existing (central) collective agreements that apply to the place where the posted employees perform their work, whereas others have followed the pattern (normal in Denmark) of direct collective bargaining, including warnings of industrial action and industrial action actually being taken. Only in these latter cases of direct bargaining with the foreign service provider, in Denmark, may the trade unions negotiate provisions concerning control visits by the union.¹²⁸ In Sweden, specific bargaining took place among domestic social partners in order to modify an important obligation that follows from all collective agreements – namely to effect different types of insurances – to the situation of a foreign service provider. In the private sector, the terms of these insurances are laid down in collective agreements between the trade union confederation for blue-collar workers, LO, the bargaining cartel for salaried employees in the private sector, PTK, and the Confederation of Swedish Enterprise. A few years ago they agreed to amend the terms so that employers with only temporary activity in Sweden would not have to pay insurance premiums for risks for which their employees are already insured or for insurances from which they would not be able to benefit in practice.¹²⁹

In the UK the so-called NAECI agreement in the construction industry indicates collective bargaining activity in relation to posted workers. This is designed to ensure that posted workers enjoy the benefits of the agreement. Moreover, the auditing provisions of the NAECI agreement have been improved, one effect being to enable unions to determine whether the terms of the agreement are being applied to posted workers as well as to others.

In Italy, too, trade unions are most active in the construction sector. Their activities focus mainly on opposing social dumping. The three most representative trade unions (local unit of CGIL-CISL-UIL's construction sector federations) act together and adopt the

¹²⁷ Belgium: In the cleaning industry, a provision of a CLA on wages, wage supplements and premiums explicitly refers to the full equal treatment of all foreign workers (CLA of 3 May 2007 of joint committee 121 (cleaning industry)); also in a CLA in the construction sector, a provision was introduced in 2008 according to which the number of subcontractors should be declared, but this is not systematically applied. NL: special provisions or modifications to provisions in CLAs in the construction industry and TAW to better suit the conditions to the posting situation.

¹²⁸ One of the Danish trade unions, 3F, has published on its website a list of foreign companies that have entered into collective agreements.

¹²⁹ These premiums still did apply and were contested in the Laval case (C-341/05). See especially the Conclusion of the AG, Mengozzi, 23 May 2007, points 284-292.

same strategies. The union intervenes every time foreign undertakings do not apply the prevailing (sectoral and local) collective agreements and when they are not registered in the local construction fund.¹³⁰ However, each regional labour market in Italy has its own characteristics and this hinders a unitary, nationwide strategy of industrial action and collective bargaining. For instance, union branches in the Province of Milan assert that, in most cases, they are able to convince foreign undertakings to apply the prevailing collective agreement and to join the construction fund. This is also the trade union's practice in North-Eastern Regions (Friuli and Veneto). Here, however, industrial action is more difficult because posting is a more widespread phenomenon than in Milan. In some cases, union branches, the foreign service provider and the Italian user company conclude specific agreements according to which working conditions fixed by local and national collective agreements and law provisions in force, also have to be applied to posted workers.¹³¹ Matters are different in Southern Italy, where trade unions have greater difficulty in acting against foreign undertakings, since the work is often entirely undeclared.

In other Italian branches, bargaining practices seem to be less widespread, even if a strong action tradition of trade unions against social dumping exists in some industries. For instance, in the health care sector, industrial action is aimed at combating the exploitation and dumping practices related to posting of Eastern European nurses by foreign temporary work agencies. In Piemonte, such industrial action induced public hospitals (ASL) to implement public selection procedures in order to monitor the recruitment of workers posted by foreign agencies.

(Sectoral) cross-border arrangements between social partners

Several countries have sectoral cross-border arrangements on the comparability of protection offered by collective agreements. Apart from the bilateral agreements between the German ULAK (already mentioned in section 3.5), with its counterparts in Belgium, France, the Netherlands (terminated), in order to exempt companies established in both countries from paying contributions on behalf of posted workers, and the Belgian-Dutch agreement in the construction sector on the equivalence of labour standards in their respective sectoral CLAs, in the German TAW branch, there is a cross-border collective agreement of 19 December 2003 between several different French temporary work agencies on the one hand and, on the other, the German United Services Union (Verdi) as well as the industrial union mining, chemistry and power (IG BCE). From Romania, the existence of cooperation agreements with trade unions in Italy for the protection of the Romanian workers in Italy was reported, and also that progress was being made on concluding similar agreements with other trade unions in Cyprus and Germany (note, however, that these agreements are not targeted at posted workers, but at migrant

¹³⁰ Italy: Note that industrial action is much easier in case of posting of workers by an undertaking established in a third State, thanks to the requirement of a previous communication to local trade union units. The importance of the previous communication to trade unions imposed under immigration law was one of the main findings in research financed by Regione Toscana on posting of third country workers: F.Bortolotti - A.Tassinari (eds.), *Impiego di manodopera straniera in Toscana*, Plus ed. Pisa, 2008

¹³¹ That is the case of the agreement concluded in Tuscany on 23 February 2004 among local representatives of CGIL, CISL and UIL, the Italian user firm Katac and the Romanian Costache, which had posted 28 of its employees under a construction contract lasting 19 months

workers; with regard to the agreement with Italy, trade union representatives were of the opinion that Romanian posted workers in Italy are covered by the agreement).

No bilateral agreements were mentioned in the other country reports (DK, Lux, PL, UK, Sw, EE).

Other actors involved

Finally, in some countries other actors than trade unions were mentioned as a source of support for posted workers, such as embassies (FR: activity of Polish embassy) and churches (BE, NL), since the vast majority of posted workers in these countries are Polish workers and most Polish workers have a Christian background. The Polish expert referred to assistance centres for foreigners (Polish expatriates have their own centres) in host countries, in addition to the Labour Inspectorate and local labour offices. With regard to the UK, the role of ACAS (Advisory, Conciliation and Arbitration Service) should be mentioned once again. All employers and employees can obtain free advice from the ACAS website or by calling its telephone helpline.

Possibilities for lodging complaints

Posted workers

Apart from legal remedies, as mentioned above, in none of the countries are there specific complaint mechanisms for posted workers to lodge complaints about non-compliance with the PWD. Posted workers can make use of the same methods of complaint as any other worker in these countries, such as contacting the trade unions or the labour inspection services with their complaint. However, these complaint mechanisms available under the designated legislation may generally not be considered either understandable or accessible to posted workers. Hence, in practice, most posted workers do not complain about possible non-compliance, partly because in some instances they are afraid to do so, or because this could cause them to lose their job (see also section 4.5).

As was reported from Belgium, if there are any complaints from posted workers, they always seem to reach the inspection services indirectly, “through the grapevine”. To make it easier and to dispel concerns there is an anonymized complaint procedure in Germany. According to statements by one of the interviewees this procedure is used only rarely due to people's inhibition in denouncing others. In some cases, the trade unions are the link between the posted workers and the inspection services, but there seems to be no or only insufficient systematic cooperation between the trade unions and the inspection services in this regard. No legal obligation imposed on the service providers or recipients of services to inform posted workers of their rights or on how to lodge complaints were reported in the host countries under study, either. From Italy, in case of a controversy between a posted worker and his employer (or the user), it was reported that conciliation can be attempted through a dispute resolution committee established in DPLs and composed of representatives appointed by most representative trade unions at national level (Articles 410 and 411 of the Civil Procedure Code). In Poland, workers can lodge complaints through the Labour Inspection, trade unions, associations and non-governmental organisations. In fact, regional inspectors receive many applications for information as well as claims. According to the trade unions, a large number of workers’

claims submitted locally and abroad are submitted by posted workers. The Labour Inspectorate in Krakow receives approximately 40-50 thousand claims a year. However, the rate of claims and applications submitted by workers posted for the provision of services is not known.

Service providers

Although this section is primarily concerned with remedies for posted workers, it is interesting to note that with regard to obstacles concerning the free provision of services in the EU, a special complaint mechanism does exist. As a result of the Single Market Action Plan of 1997, foreign service providers can contact the national points of contact of the Internal Market Problem Solving Network (SOLVIT) with complaints about the authorities' application and enforcement of the rules on posting of workers. As was emphasized in the German report, the SOLVIT procedure is not available in situations where the person concerned is of the opinion that an undertaking or another private party did violate his or her free movement rights.¹³² Most SOLVIT offices could not provide our national experts with any official complaints record concerning the posting of workers, either to or from their countries, with the notable exception of Poland (see below). After some research in archived files, SOLVIT Belgium did find a question from the SOLVIT bureau in the Netherlands with regard to the Limosa declaration caused by some sectoral complaints about the Limosa declaration for self-employed persons in the light of the free movement of services, more specifically in the light of the Services Directive. According to the official website of SOLVIT France,¹³³ only 4% of their activity concerns employment rights, 14% social security issues and 11% tax. According to an interviewee it seems that they have received no complaints so far from service providers established in France and posting their workers abroad. The absence of complaints was explained by the fact that SOLVIT and its missions are not yet very well known. Regarding France as a host country, only two claims were reported on the application of the PWD. The first came from a Portuguese service provider who posted in France, among others, a worker from Angola. According to the complaint, although during an inspection control the worker showed a valid residence card, a contract of employment, his Inland Revenue registration number, and an E-101 document, he was prohibited from working. In that context SOLVIT Portugal requested SOLVIT France to intervene. After confirmation by SOLVIT Portugal of the scope of the resident card, the worker was permitted to work in France. The second complaint came from a Temporary Work Agency established in the Netherlands which contested a decision of the French Ministry of Labour according to which they could no longer hire out workers to campsites established in France as they did not comply with legislation on Temporary work agencies.

¹³² Recommendation of the European Commission of 7 December 2001 on principles for using "SOLVIT" – the Internal Market Problem Solving Network (2001/893/EC). The criteria established in the Commission Recommendation relate to the following matters: the case referred to SOLVIT should concern an alleged violation of European law by a public authority and be of a transnational nature. The problem cannot concern an enterprise-enterprise or consumer-enterprise relationship and cannot be subject to national or European court proceedings.

¹³³ http://www.sgae.gouv.fr/droit/htmlpages/droit_solvit_domaine.html

The service providers established in Estonia and Romania have not used their possibilities to lodge complaints or ask for help at SOLVIT the national point of contact when they encounter problems with the rules on posting of workers with the authorities of another Member State.

Polish companies posting workers in the framework of the provision of services rarely lodge complaints either. In case of problems they approach the embassies or consulates, chambers of commerce, and associations and non-governmental organizations. Based on information collected from the Polish SOLVIT office, located in the Ministry of Economy, there have been complaints, but only prior to 2009. Complaints filed between 2004 and 2008 concerned three areas: questions related to the right of residence in other EU countries; social insurance; and questions regarding the recognition of professional qualifications of Polish workers in other EU countries.¹³⁴ Ever since the Polish Coordinating Centre was established within the SOLVIT network, i.e., since 1 May 2004, a number of requests have been filed with the Centre concerning problems of Polish businesses that have posted their workers to EEA States. Of these requests, 11 have been qualified as fulfilling the SOLVIT criteria and on this basis they have been included in the SOLVIT internet database. Taking into account the number of postings of Polish workers abroad (e.g. in 2007 the Social Insurance Office issued 183,916 E-101 forms to posted workers¹³⁵) one may conclude that the number of complaints filed with SOLVIT is relatively small.

Four problem areas may be distinguished in the 11 complaints filed: (1) *The necessity of obtaining a work permit by posted workers.* The SOLVIT statistics with respect to posted workers indicate that most complaints filed with the system concerned the necessity of obtaining a work permit by Polish posted workers for undertakings wishing to provide services in the Netherlands. Among four cases registered in the system against the Netherlands, two cases in 2004 were discontinued after being resolved. Two other cases registered with the SOLVIT on-line database in 2006 could not be resolved. As the Dutch side explained, after the complaint was lodged the necessity to obtain a work permit was withdrawn and in 2005 it was replaced by a so-called system of notification, which the Dutch SOLVIT Centre states satisfies the requirements of European law.

(2) *Necessity of acceding to collective agreements by Polish service providers.* By analogy to the matters covered by the decision of the Court of Justice in case C-341/05 Laval, in 2005 Polish enterprises reported to SOLVIT the case of Danish trade unions forcing service providers in Denmark to accede to collective agreements. Unfortunately, the Danish SOLVIT Centre did not attempt to find a solution to the problem, arguing that the matter was too political.

¹³⁴ On 6 May 2008 the European Committee of the Council of Ministers obliged the Ministry of Labour and Social Policy, in co-operation with the Ministry of Economy, to prepare an initial legal analysis of data collected within the SOLVIT framework and the European Business Test Panel concerning irregularities encountered by Polish businesses which post their workers to another Member State, taking into account most recent judgments of the ECJ.

¹³⁵ An E-101 confirms that a posted worker or a self-employed person is covered by social security insurance in the State where such person usually carries out his or her professional activity. A person may receive several E-101 forms each year.

(3) Cases concerning *the co-ordination of social insurance matters with respect to workers posted abroad*. In 2006 the Polish SOLVIT Centre reviewed two cases concerning the co-ordination of systems of social insurance relating to workers posted abroad. These concerned problems encountered by Polish enterprises in contacts with the Belgian and the Dutch authorities (both on a request to conclude an agreement based on Article 17 of Regulation 1408/71/EEC, on the basis of which Polish employees posted to work in Belgium/NL by Polish enterprises would be subject to Polish legislation in matters of social security). Another case concerned the German authorities (in respect of an obligation that amounted to a violation of European law, placed by a German sector institution on a Polish enterprise posting workers to Germany on the basis of freedom of services. The enterprise was obliged to complete a questionnaire, the purpose of which was not only to clarify which social insurance system it was covered by, but also to provide a lot of other information, which by its nature was confidential. As a result of SOLVIT's intervention, the appropriate German authority undertook to change the practice and to rely exclusively on the information contained in form E101). The three cases were discontinued by SOLVIT after they gained the status of resolved matters.

(4) *Recruitment agencies and temporary work agencies*, and the posting of workers to Belgium. The Polish SOLVIT Centre has registered two cases concerning the operation within the territory of Belgium of Polish recruitment and TWA agencies. In these cases the necessity of obtaining a permit for the provision of services, as well as the conditions under which such a permit is issued, were subject to analysis. Because the applicant had not applied for a licence to provide services in Belgium, after over two months of consultations concerning the merits of the case, both SOLVIT Centres (in Poland and in Belgium) jointly decided to withdraw the matter from the database. The other case remains unresolved.

4.6 INSPECTION AND ENFORCEMENT ACTIVITIES

This last section of chapter 4 examines the state of play regarding inspection and enforcement activities, including the existence of (cross-border) cooperation between inspectorates.

Nature and frequency of inspections

In all hosting Member States, with the notable exception of the UK, there seems to be a policy trend towards greater emphasis on stringent enforcement.¹³⁶ However, the traditions in the Member States are very different regarding their inspection activities, the nature of their controls and sanctions, as well as their competences. From a comparative perspective, in Luxembourg and Germany the responsible inspectorates seem to have rather far-reaching competences (for example, the German customs authorities may even investigate without any relevant suspicion, while in Luxembourg the frequent use of compliance orders is striking), whereas in the Netherlands only recently a government decision was approved to extend the competences of the Labour Inspectorate to cases of underpayment. Currently, the Dutch Labour Inspectorate is allowed to check the pay slip of a (posted) worker, but if the employer refuses to cooperate, it is not authorized to confiscate the employer's administration in situations where underpayment is suspected.

Interesting – but beyond the scope of this research study – would be a much more detailed comparison of the different national authorities and their competences, including their use in practice, in order to shed more light on the effectiveness of the different enforcement systems in situ. The same holds for the frequency of controls and the staffing of the inspectorates. Many of the Member States noted a shortage of manpower (BE, FR, DE, NL), sometimes despite recent expansion, as a great underlying problem leading to weak enforcement results in practice.

Own initiative or on request?

The controls stem predominantly from the inspection services' own initiative, as they receive very few complaints or requests – something that was noted in Belgium, France, Italy, and the Netherlands. Nevertheless, in some cases controls follow after a hint by other inspection services (e.g. the social security authorities) or the trade unions, but such on-demand controls are relatively exceptional. Nevertheless, complaints play a more prominent role in some systems. A remarkable point in the report on Luxembourg is the strong commitment of the employers' association (Federation of Craftsmen) in the handicraft sector to communicate to ITM 'any distortion of competition by foreign companies posting their workers to Luxembourg and who do not meet the minimum wage in Luxembourg and every violation of national safety and health rules and of working conditions established by the companies member of the Federation'. This information is provided by the Federation to the ITM with a request to take the necessary

¹³⁶ For an account of the similar trend in DK, Sw, NL and Germany, see also the respective Formula papers.

action (audits of companies, bring to a halt sites of non-compliant companies, etc.) and thus restore fair competition. In Denmark, controls are traditionally predominantly based on complaints. In principle no controls take place at the inspectorate's own initiative (but see below). In Italy, where requests for intervention from trade unions seem to occur relatively frequently, practical experience in recent years demonstrates a trend towards reducing the interventions "on demand", implementing forms of programmed intervention instead. In a policy document from the Ministry of Labour, in particular, inspectors are invited to disregard the "anonymous requests submitted by mail, email, fax or phone". The Italian expert remarked that in practice this may (also) reduce the possibility of complaints of irregularities from a single foreign posted worker.

Risk assessment

With regard to controls at the inspectorate's own initiative, in all host countries the frequency with which a given workplace is inspected depends (in part) on the risk of the activities carried out. Hence, risk management is used to target controls at certain sensitive sectors. Risk assessment shows that infringements occur more frequently in sectors such as construction, metalwork, agriculture, horticulture, cleaning services and the meat industry. The (possible) presence of posted workers is nowhere an independent factor in this risk assessment, but a sector which involves many subcontractors and many foreign workers with little knowledge of languages is in itself a factor that increases the risks. This means that such workplaces are controlled more frequently. However, the risk assessment is not dependent on the legal status of the foreign workers, i.e. the fact that they are posted workers (in contrast, for example, to self-employed contractors or workers using their own freedom of movement) does not in itself influence the risk assessment.

In Sweden, the risk assessment is also based on signals from the workplaces, i.e. complaints from workers and safety delegates. As in many other Member States, there are two situations where the labour inspectors must check on the workplace: when an accident has happened and when a safety delegate has stopped dangerous work.

In Belgium, where the posting of workers has to be declared via the Limosa system, either by the posting employer or by the Belgian user undertaking, a consequence of the declaration is that the posting of workers to a certain workplace is known to the inspection services. Some employers have complained about the fact that the Limosa declaration "inspires" the inspection services to visit the workplace/site, whereas the absence of the declaration reduces the chances of being controlled. In other words, respect for the mandatory Limosa declaration on the posting of workers is seen as a potential increase in the chances of a control. However, the labour inspection services confirmed that they do try to find a balance between controls inspired by the Limosa declaration and completely spontaneous non-Limosa-related controls. In France, it was also confirmed that two out of three controls in 2007 were based on the declaration of posting (71% of controls, 666 of 942). Of these controls, 60% concerned construction sites (BTP), 13% industry, 10% agriculture, 7% entertainment, 6% temporary agency work, and 4% others. In 2008, only 54% of controls (388 of 714) concerned foreign service providers having proceeded to a declaration of posted workers. Of these controls,

75% concerned construction sites, 9% industry, 7% temporary work, 6% agriculture, 1% entertainment and 2% others. Nevertheless, controls of foreign service providers without prior declaration are on the increase (192 in 2006, 276 in 2007, 326 in 2008). One labour inspector said that the nationality of the service provider plays also a significant role in the decision to control. As a result they would tend to control more frequently service providers from Poland, Rumania or Bulgaria.

In Denmark, too, the register RUT is the WEA's primary source of information regarding the presence of posted workers in Denmark. The Authority will plan visits to these workplaces, but they have experienced situations where the workers are no longer present when they arrive, often because they are at the site for short periods and do not always register changes in the workplace locations, as required under the registration rules. In contrast to its tradition (as mentioned above), the Danish Inspectorate is currently working with a screening approach mandated by law to cover the period 2005-2011, during which they are to make one visit to all workplaces in Denmark in order to identify those that have problems. Those identified as such will then be visited again, in some cases at regular intervals. The only other occasion when the WEA will inspect a workplace is if they receive a complaint or a specific problem comes to their attention in some other way.

In Germany, apart from spontaneous inspections and inspections based on risk analyses, there are also inspections without any relevant suspicion. The customs authority is the only authority with a right to inspect without any relevant suspicion pursuant to §§ 3, 5 SchwArbG.

Frequency of controls

With regard to the number of controls, the country figures seem to imply great differences in the frequency of controls, which may be an important factor in explaining the (in-) effectiveness of an enforcement system. It should be noted, though, that the numbers mentioned are not fully comparable, because some national experts only report controls involving foreign labour (BE, FR, LUX), whereas others (NL, DE, SW) report general figures. Moreover, information is lacking about the context: how many firms are established in a country, etc? Nevertheless, from this very incomplete comparison it may safely be assumed that, corrected for the size of the population/number of firms, inspectors in Luxembourg conduct the most inspections.

In Belgium, in 2008, 495 foreign undertakings were controlled by the COVRON network,¹³⁷ comprising more than 5,000 workers in cases of social fraud. In 510 cases the employer received a warning. For 277 infringements, involving 2,349 workers, there was a regularization of the situation, resulting in an amount of 1.301.957 €. In 244 other cases the employer was charged, with 2,362 workers involved and bringing in € 701,921.¹³⁸

¹³⁷ COVRON is a network of labour inspectors specialized in dealing with cross-border cases.

¹³⁸ Year report of 2008 of the FPS Employment, Labour and Social Dialogue. See <http://www.werk.belgie.be/WorkArea/showcontent.aspx?id=24156>

In France foreign service providers are subject to frequent controls. According to DILTI's¹³⁹ research results on foreign service providers (2007), there is a constant increase of foreign service provider controls. There were 681 in 2005, 1098 in 2006 and 1390 in 2007. In 2008 they were reduced to 1024.¹⁴⁰ In 2008 56% of the controls and resultant charges were initialized by the labour inspectorate, 9% by the administrative cooperation initiative (ex-COLTI), 7% were initiated on the basis of a complaint, and 4% after denunciation.

In Luxembourg the number of controls on sending companies that more or less regularly post employees in the Grand Duchy, in all economic sectors, were in 2007: 5,663 and 2008: 6,647. Within the framework of posting workers to the Grand Duchy, seven 'punch actions' on important sites were completed in 2008, 66 companies were ordered to stop work immediately, including 27 orders issued by Customs Officers.

In Germany, according to a spokesperson in the Ministry for Finance, in the year 2009 up to 500,000 workers and more than 50,000 employers underwent control measures by labour inspectorates. Among these were 190,000 workers and 16,000 employers active in branches listed in AEntG. Control measures revealed a large number of cases of non-compliance, which resulted in extensive press coverage, but no official recognition thereof was included in the statement from the Ministry in response to the question of the national rapporteur.

In the Netherlands some 550,000 firms are established, 80 % of them employing fewer than 10 employees. In 2009 controls took place at 21,386 companies. This led to 4983 administrative fines and a considerable number of other interventions to enforce labour standards, such as warnings and orders to stop work immediately.

In Sweden the Work Environment Authority has to monitor compliance with the rules on health, safety and hygiene involving approximately 30,000 workplaces. In 2009, its inspectors controlled 19,000 of these. The frequency of these controls varies from region to region and with each sector. On average, workplaces in Stockholm are controlled every ten years, while in smaller towns they are inspected annually.

Assessment of a worker's status

As reported from all predominantly hosting countries, the inspectorates face huge problems in identifying bogus self-employment. Often – in reality – posted (or migrant) workers may be disguised as self-employed, showing their E-101 form issued for social security purposes as proof. National stakeholders are very critical of the great gap between the legal value of the E101 (now A1 form) according to the case law of the EU Court of Justice and the actual value of this document, which often seems to be falsified, not filled in or incompletely filled in, and as a result does not represent the real situation

¹³⁹ Délégation Interministérielle pour la lutte contre le travail illégal, now dissolved.

¹⁴⁰ Ministry of Labor, June 2009.

at all.¹⁴¹ Nevertheless, most labour inspection services actually (have to) use the E101 as a first indication or a first element of proof of the status of the person as a worker or a self-employed person, although they are well aware that the E101 for self-employed persons cannot be contested in the legal order of the host state. Thus, on the whole, the host state authorities have to rely on the information given by the issuing authority in the sending state, since only the competent authority in the sending state can revoke the E101 form. Therefore, the competent agencies concentrate on checking how the information given in the forms corresponds to the conflict-of-law rules in the regulation. For what period is the certificate valid? What workplace does it indicate – and does it exist? Is the workplace in the host country a temporary work agency? As the Swedish report states, if it is a temporary work agency, the Social Insurance Agency may investigate the case further, as it is difficult for the authority in the sending state to check the work in Sweden.

For labour law purposes, the E101 is (only) one of the indicators of qualification for the status of worker in labour law. If enough evidence (such as that the “service provider” is receiving orders from the recipient as to the specific conditions of execution, does not possess or provide his own material, or is paid for an amount of work/time instead of being paid for a specific result) can be gathered testifying to the existence of a relation of subordination between two parties, the status of the ‘self employed’ person according to social security law may still be revised to that of an employee. Other criteria which inform this decision as mentioned in the German report (but not exclusively valid for this country only) are that the person generally does not employ employees subject to social insurance contributions related to their own activity; the person permanently and primarily acts for only one employer; the employer or a comparable principal regularly has similar activities performed by employed workers; the activity does not show typical characteristics of entrepreneurial action; the activity's external appearance corresponds with the activity the person performed for the same employer previously within an employment relationship. In unclear situations in France, the labour inspectorate can additionally request the intervention of the liaison office in order to establish whether the worker in question has any real activity in the country of origin. There are different options to determine whether or not a company / a self-employed actually is established in the posting country, often involving the documents demonstrating enrolment in the appropriate registers provided for by the law of the country of origin. Hence, for labour law purposes, a comprehensive judgmental view of each individual case is necessary in each country. However, *the burden of proof is sometimes very onerous*. In this regard, in e.g. the Netherlands, a legal presumption applies of the existence of an employment relationship, in the situation that someone has worked for someone else for a duration of at least three months, either weekly or for at least 20 hours a month, against remuneration paid by the other. In that case the burden of proof is on the employer to rebut this legal presumption.

¹⁴¹ Several contentious cases mentioned in this study confirm this picture of dubious E-101s. See section 3.5.

Cooperation between national stakeholders

In all host states there are forms of systematic cooperation (DE, partly IT, LUX, NL, SW) or at least of (informal) ad-hoc cooperation (BE, FR), between relevant national stakeholders in posting of workers issues, although this cooperation is nowhere specifically aimed at posted workers alone. There is still a gap between cooperation on paper (or intentions to cooperate) and actual practice, especially when it comes to the collaboration of inspectorates with social partners. In this regard, privacy legislation was mentioned as an impediment to for the exchange of data, meaning that agreements are necessary between all actors involved in monitoring and enforcement.

In Belgium, according to the Act of 1972 on the labour inspection services, there should be close cooperation and exchange of information between the labour inspection services and the social security institutions, other inspection services, all public authorities including the public prosecutor, the regions, the provinces, the municipalities and the public institutions. At present there is cooperation with other authorities and with the trade unions, but this is far from systematic. Cooperation with the trade unions is negligible, apart from a small number of cases where information was provided by the unions. Cooperation between authorities does occur, but rather on a case-by-case, ad hoc basis and pursuant to arrangements between individual labour inspectors. Some systematic cooperation occurs at the local level in the context of the “district cells”, composed of representatives of the different related federal administrations, the public prosecutor, and the federal police. An overarching authority, the SIOD, has been set up but this institution does not organize systematic cooperation between the different inspectorates. Its function is to set general goals, lay down broad guidelines, provide prevention and training programmes and fine-tune internal and international cooperation. However, according to several stakeholders it does not have a decisive influence on the day-to-day control practice of the different enforcing authorities.

In France, administrative cooperation between social security, immigration and fiscal authorities is not systematic but it is institutionalized. Decree n°2008-371, 18 April 2008, has put in place national, regional and local committees on which each one of these authorities is represented. According to circular DAGG n° CRIM 08-15/G4, 29 September 2008 part II, these committees meet at least three times a year in order to set down a programme of action against fraud and to evaluate the results of coordinated actions. Given that this administrative cooperation is fairly recent, there is as yet no evaluation of the quality of the cooperation. Furthermore, at national level successive governments have signed agreements with social partners representing different sectors, such as agriculture (25/11/2009), transport (14/03/2007), or temporary work (10 May 2006) in order to prevent recourse to illegal work.

In Germany, the customs authority is responsible for enforcement and punishment (Verfolgungs- und Ahndungsbehörde). There is cooperation between German authorities as well as between authorities and trade unions. A so-called ‘Typologiepapier’ has been developed, describing situations in which there is a regular obligation for the mutual provision of information. Such an obligation exists, for example, in case of letterbox

companies, illegal temporary agency work or bogus self-employment. To combat illegal employment, the Federal Ministry of Finances (Bundesministerium für Finanzen) and the trade unions and employers' organizations act jointly. This is embodied in so-called Aktionsbündnisse (Coalitions for Action). Coalitions for Action currently exist in several sectors, such as the construction industry, the Shipping, Transport and Logistics Industry, including postal services, the meat industry and the industrial cleaning industry.

In Italy, there is a general coordination system – not specifically confined to posting – including inspection staff of the Ministry of Labour and staff from INPS, INAIL (Social Security Institutions), ASL (National Health Service Unit), Guardia di Finanza and Carabinieri (Police Authorities). At the top of the coordination chain of inspection the “Central Committee for coordination of supervision” is established (Art. 3, D.lgs. 124/2004), which brings together the heads of all the authorities involved. The DRL coordinates the activity of labour inspectors and inspectors of social security institutions. At the regional level a Coordination Commission of Control also operates, composed of other regional authorities performing supervision functions (Article 4, D.lgs. 124/04). At the provincial level DPL also coordinates and directs the inspection activities of the inspectors working in every social security agency and ASL “to avoid duplication of efforts and standardize the course of action”. A database has been created at the Ministry of Labour, which collects information about inspected employers, which is accessible by inspection bodies (Article 10, D.lgs.124/04). So in Italy a systematic coordination of inspection has therefore been established within the social security institutions and ASL, but not with other public authorities.

In Luxembourg, in practice, patrol officers (2 to 4 officers), operating randomly, several times a week, particularly in cooperation with other central and regional offices of the ITM, motorized brigades of the Customs and Excise Administration and the Regional Services of the Police Force [Police spéciale], guarantee some territorial coverage of inspections. The ITM Posting Department also assumes an organizing and motor function in the context of the "Cell of Interadministrative Fight against Illegal Work" (CIALTI), able to mobilize, if necessary, over 200 officers, from 6 to 8 ministries or administrations. There is systematic cooperation with social partners. Collaboration with the other public authorities involved in the posting process is casual. There are as yet no information policies/guidelines agreed between the inspectorate and social partners/other authorities, but it is planned. There are regular contacts in practice.

Since 2007, in the Netherlands, the Tax Department and the Labour Inspectorate cooperate more closely than before to counter illegal labour, undeclared employment and migrant workers posing as bogus self-employed. The Labour Inspectorate also started notifying workers and trade unions of cases of infringement of the law on minimum wages, with the aim of facilitating taking matters to court to demand back payment. The idea is that by passing on information, trade unions can better enforce observance of CLAs. However, trade unions are not content with the cooperation in practice. In sectors with much abuse, such as agriculture and horticulture, the temporary agency sector, construction, transport, cleaning and retail, the competent authorities work systematically together in so-called intervention teams. The activities of such an *Intervention Team* (IT)

are announced in the public press some weeks or months before the operation starts, but individual employers are not informed beforehand when and where inspections will take place. The press releases issued by the Ministry of Social Affairs and Employment are presumed to have precautionary effect.

In Sweden, the Social Insurance Agency and the Tax Agency engage in systematic co-operation, since the first decides what social security scheme will be applicable while the second collects the social insurance contributions. There is no systematic co-operation between authorities and social partners, but the trade unions in particular regularly inform the authorities when they suspect undeclared work or other types of abuse of the rules on posting.

Reasoned requests and cross-border cooperation agreements

One of the tasks laid down in Art. 4(2) PWD is *to reply to reasoned requests* from equivalent authorities in the other Member States for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities. Below we present an account per country, including the number of cooperation agreements. Compared to earlier findings of the Commission in 2003, 2006 and 2007, cross-border exchange of information and cooperation is on the rise. However, despite the progress being made, mutual administrative assistance is still far from functioning smoothly and effectively. In general, the findings under this heading can be concisely summarized: cooperation (to varying degrees of intensity) mainly occurs between neighbouring (most often ‘high-wage’) countries (sometimes in the context of Eurregions) or with countries that export a considerable number of posted and/or migrant workers (PL, PT, RO, BUL). Hence, between the vast majority of Member States cooperation is more or less non-existent or occurs only at a very low level. Evidently this is not problematic if there are no ‘flows’ of posted workers between the countries concerned. In some countries it was stated that most administrative cooperation takes place after the period of posting (but this may also concern social security matters, since not all national interviewees distinguished sharply between PWD related requests and requests on other issues concerning posted workers).

The number of bilateral, cross-border cooperation agreements between inspectorates has increased in recent years, partly as a result of the Commission’s communications¹⁴² on the need to establish an in-depth, cross-border administrative cooperation with regard to posting of workers (and the setting up of an expert group). The account in the French report of an agreement between France and the Netherlands may illustrate the content of most of these agreements: according to article 1 the contracting parties agree to take joint action in order to promote the application of directive 96/71 CE; avoid abusive use of posting rules and of violation of the labour standards in the host country; avoid the abuse of unemployment benefits. The agreement provides (article 2) that information about the

¹⁴² See in this respect Commission’s Recommendation of 31 March 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services; see also COM (2006) 159 final 4th April 2006 and COM (2007)304 final, 13 June 2007.

applicable rules should be provided in the language of the workers involved; (article 3) that joint actions can be integrated in a common plan providing for joint financial support; (articles 4 and 5) that the contracting parties seek to bring French and Dutch administrations closer in order to facilitate the control of posting situations. Requests for information must be motivated and will receive a prompt reply as long as they do not entail excessive administrative burden. The liaisons offices must keep their counterparts informed about the use of information they receive and if one of the liaison offices has established the violation of European social security legislation it must inform its counterpart and the social security authorities of the two countries. According to article 6, labour inspectors are entitled to receive training from the contracting party to ensure they become familiar with their legislation. The agreement's operation will be evaluated annually and the contracting parties agree to meet every two years to discuss issues arising from the agreement's operation.

Predominantly host states

In Belgium, according to the Act of 1972 on the labour inspection services, the labour inspection services should cooperate with labour inspection services of other member states of the ILO. With regard to the cooperation with labour inspection services of other EU Member States, the Belgian labour inspection services generally do not have very positive experiences. Cooperation is running relatively smoothly at the moment with only a limited number of Member States. The Belgian labour inspection services have formal *cooperation agreements* with France, Luxembourg, Poland and Portugal, and an agreement with Bulgaria is underway. The Netherlands also seems to be interested in such an agreement with Belgium. The best cooperation seems to be the spontaneous and own-initiative contacts between inspection services in border regions, which meet regularly to discuss the most problematic issues. In the central administration of the labour inspection services, a SPOC (Single Point of Contact) was been installed in 2006 to have one point where queries related to the posting of workers can be dealt with. In principle, the responsible persons in the labour inspection services are satisfied with the SPOC contacts. In 2008 there were 226 outgoing and 10 incoming requests. In 2009, approximately 117¹⁴³ outgoing and 13 incoming requests were noted. Interestingly, the level of cooperation often varies from country to country. Certain Member States excel in answering general, system-related questions but perform inadequately when answering concrete questions about specific cases. With other Member States matters are precisely the opposite. However, apart from some naturally evolved border-region contacts with the inspection services of neighbouring countries and some strategically chosen partner Member States like Poland and Portugal, cooperation with all the other Member States is virtually non-existent. This goes for both old and new Member States. Complaints from the Belgian labour inspectors range from having no real contact point in other Member States, to having contact points but never getting answers to queries, to having contact points in other Member States, while the administrative structure or the legislation of the administration of some Member States does not allow the contact point to gather the requested information.

¹⁴³ This decrease in the number of outgoing requests is remarkable, but can easily be explained by the fact that in 2008, the Belgian SPOC sent two requests to each Member State with regard to a general question of information.

In France, the Strasbourg Labour Inspectorate (Direction générale du travail) acts as Liaison office with Germany.¹⁴⁴ It is important to note that Germany (behind Poland: 5447 declarations in 2007 and 6847 in 2008 and recently Luxembourg, 8403 declarations in 2008) is the country whose service providers are most active in France (2930 German service providers declared posting in 2007 and 4713 in 2008). Thanks to the special *cooperation arrangement* with Germany (FKS), requests for information are treated rapidly and response is particularly effective from both sides of the Rhine. In 2009 they received a total of 23 requests from their German counterparts. Strasbourg labour inspectorate claims to have given a satisfactory reply in all cases within two weeks on average. The Strasbourg liaison office transmitted 44 requests to their German counterparts. Among these requests 22 concerned the construction industry, 3 temporary work agencies, 1 transport and 18 others. 39 requests were initiated by Labour inspection, 3 by the Police forces and 2 by social security authorities (URSSAF). The German Liaison office provided a satisfactory reply in all cases, but three took two weeks on average. Most requests concerned verifications of the declaration of workers in the country of origin and abuse of unemployment benefits. The French liaison office in Paris gave the following figures: 29 requests coming from French authorities and 11 from EU liaison offices in 2008; 81 requests from French authorities and 16 from EU liaison offices for a total of 97 in 2009 and until May, 40 requests from French authorities and 7 from EU liaison offices for 2010. Most of the information requests concern the assessment of service provider's significant activities in its own country and are addressed to Germany, Belgium, Poland, Portugal, Romania and Bulgaria. Cases of false payslips involved Bulgarian and Rumanian service providers in the forestry and agriculture sectors. During controls labour inspectors were alarmed by the payslips provided, which seemed, they said, "too good to be true". They suspected they were false and initiated a request procedure to obtain information from the Bulgarian and Romanian liaison offices as to the level of remuneration. The liaison offices did provide information, which established that the actual remuneration of the workers was between 110 and 150 Euros per month. The French liaison office stated they were relatively satisfied with the cooperation they have with their Romanian and Bulgarian counterparts. However, they still have some communication problems. They admitted that they always send information requests in French. Some Liaison offices, such as the Polish liaison office promptly reply in French. However this policy of not translating information requests does involve misunderstandings. They frequently receive unsatisfactory replies and then – of course – they need to send back a new request, which – of course – delays the procedure.

Administrative cooperation does not come to an end when posting is over. On another occasion a Polish service provider (Fazbud SA) initiated on 18/02/2009 a request procedure to find out the working conditions that should have been applied to his workers during their posting in France from 04/01/2005 to 31/012/2005. He did so in order to defend himself against a court action brought by posted workers in Poland in regard to the period of posting. The French liaison office provided a reply on 26/02/2009 with respect to the relevant period.

¹⁴⁴ And the North Pas-de-Calais Labour Inspection acts as Liaison office with Belgium.

Cross-border cooperation agreements between France and other EU countries regarding administrative cooperation and exchange of information have been concluded with Germany (31 May 2001) and Belgium (9 May 2003), and trans-border de-concentrated liaison offices have been installed in Alsace (for Germany) and North Pas-de-Calais (for Belgium). These two agreements, especially the one with Germany, seem to be working well. In 2007 a cooperation agreement was signed with the Netherlands. The agreement entered into force in December 2009 because its enforcement required formal ratification by Parliament. However, the Liaison Office in Paris seemed already doubtful of the agreement's utility and operation in practice. On the one hand the cooperation agreement does not provide for substantially different or enhanced cooperation measures, while on the other, cross-border service provision between France and the Netherlands is limited and has only generated one information request. France is also currently negotiating agreements on cross-border cooperation with Spain,¹⁴⁵ Italy, Germany Luxembourg, Poland and Portugal. It seems, however, that the requirement of Parliamentary ratification is not only delaying the process but also discouraging several foreign governments.

In Germany, since 1 May 2010, cooperation and mutual legal assistance with foreign authorities is based on: Article 76 of Regulation (EC) No. 883/04, Regulation (EC) No. 987/09, Article 4 paragraph 2 of the Posted Workers Directive. According to the Federal Ministry of Finance, there are no set rules regarding formalities and content of requests for information in the framework of legal assistance. The group of experts has drawn up a form for optional use for requests for information regarding transnational posting in the context of Article 4 of the Directive concerning the posting of workers. Social data privacy as well as general data privacy also has to be observed with foreign authorities. However, § 77 of the SGB X and § 4b of the Federal Data Protection Act (BDSG) contain appropriate opening clauses. The Bundesfinanzdirektion West (Federal Finance Department West)– Department Zentrale Facheinheit acts as liaison office in keeping with Article 4 of the Posted Workers Directive and receives requests for information concerning possible or manifest cases of violation of the AEntG from foreign authorities. The requests do not always bear exclusively on the competence of the Bundesfinanzdirektion West (Federal Finance Department West). Thus, some of the requests (e.g. violations of health and safety regulations) are forwarded to the competent authority. In 2008 and 2009 the Federal Finance Department West – Department Zentrale Facheinheit received 37 and 30 requests for information concerning violations of minimum wages provided by the AEntG. The information was requested by the following member states: Belgium (19 requests in 2008 and 9 in 2009), the Netherlands (8 in 2008 and 6 in 2009); Poland (8 in 2008 and 14 in 2009), Lithuania (1 in 2008); Romania (1 in 2008); Slovakia (1 in 2009).

Bilateral agreements on the collaboration to combat non-registered employment and illegal cross-border temporary agency work have been concluded with Bulgaria (2008) and the Czech Republic (2009). Both agreements will only enter into force after ratification. Hence, no statement can be made regarding their effectiveness.

¹⁴⁵ France is seeking to introduce a new de-concentrated liaison office in Aquitaine and Languedoc Roussillon with regard to trans-border provision of service between France and Spain.

In Italy, the Labour Market Directorate of the Ministry of Labour (“DG Mercato del lavoro”) is the liaison office performing centralized functions (Art.5, par.1, D.lgs.72/00). The Inspective Activities Directorate (“DG Attività Ispettive”) is the office that carries out management and coordination of DPL and DRL. The latter has the function of responding to the “justified requests for information” made by the competent authorities of other MS (Art.5, par.2, D.lgs. 72/00), according to the instructions from the DG of the Ministry. The cross-border cooperation between inspection authorities varies depending on local context and on the country from which the workers are posted. Coordination depends first and foremost on personal initiative. No systematic cooperation is implemented in accordance with procedures established at national level.

In particular, cooperation with Eastern European countries is deemed unsatisfactory and in case of doubt on the legitimacy of posting, inspectors often proceed without activating contacts with the authorities of the country of origin. The difficulties are increased by the inhomogeneous functions performed by the competent authorities of the different countries (e.g. in Romania some of the functions of the DPL fall within the competence of the Ministry of Finance). In this context it is not possible to specify the number of requests. Cooperation is also quite difficult with British authorities. The situation on the border with Slovenia (in Friuli-Venezia Giulia) is considerably better. Although not formalized and again dependent on the initiative of the single agency, there are cooperation practices and exchange of information between labour inspectorates and the competent authorities of both countries. Cooperation with France is excellent.

Among Italian and French inspectorates cooperation has been developed on the basis of a Protocol (“Common Statement”) signed on February 19, 2008 by the Ministers of Labour. On the basis of this document an experimental period of cooperation started, involving inspectorates in Italian and French border regions (for Italy: Piemonte, Liguria and Val d’Aosta; for France: Paca and Rone Alpes). The cooperation led to the creation of joint teams of inspectors from both countries, working jointly in border areas. Cooperation has been effective, even if it is limited to activities against undeclared work and to monitoring compliance with rules on health and safety. The cooperation involves Italy more as sending State than a receiving one, because of numerous construction undertakings and self-employed persons in France. The development of effective modalities for information exchange should be aimed at formalizing cooperative relations with countries that post workers in Italy. To this end, recent months have seen contacts initiated with the competent authorities in Romania, currently limited to seminars with inspectors from both countries.

ITM is the liaison office responsible for Luxembourg within the meaning of Article 4 of the Directive. It receives 10-15 inquiries a year, mainly to verify the affiliation of posted workers and the existence of a significant activity of the posting undertaking in the Grand Duchy of Luxembourg. In 2008, 13 formal requests of this type were submitted to the liaison office in Luxembourg and finalized. However, the need to respond to the requests in a more informal way, and almost instantly, by all modern means of telecommunication available to the authorities, increased steadily, particularly on the part of neighbouring states, given the inherently ephemeral and random nature of postings. ITM regularly uses cross-border administrative cooperation once the posting is over. It is regularly contacted,

with no limit of time after the end of the posting period, mostly to check the affiliation with social security, and the level of wages. But all matters can be verified with regard to the provisions of Luxembourg labor law applicable to the posting, through liaison offices. In the absence of judicial investigation or administrative penalty, ITM may retain the data collected during a control for a period of two years (article L.614-3 (3) of the labour Code). Cooperation agreements were signed with Belgium on August 8, 2008.¹⁴⁶ This arrangement works well in practice. Bilateral agreements on cooperation with Poland, France and Germany are being finalized and plans for similar information exchanges with the Netherlands and Portugal are being considered.¹⁴⁷ Cross-border control actions, as well as parallel actions with the three neighbouring countries, have already been conducted in the fight against illegal posting, illegal staff leasing etc.¹⁴⁸ ITM is also actively represented by members of the posting service (Service Détachement) in a second working group, "Cross border enforcement", coordinated by the Directorate General for Employment and Social Affairs of the European Commission. The working group specializes in the field of safety and occupational health and hygiene and is managed by the Committee of Senior Labour Inspectorates (CHRIT/SLIC) of the 27 Member States. It meets twice a year in Luxembourg.¹⁴⁹

There is almost no systematic administrative cooperation with foreign social partners and / or other foreign authorities (e.g. social security, immigration or tax) for monitoring and enforcing rules on the posting of workers. However, there are excellent informal bilateral contacts and sporadic operations. An agreement for inter-administrative cooperation with Belgium exists and in June 2010 a similar agreement was signed with the Polish Labour Inspectorate, to formalize and facilitate the exchange of information on posting. Bilateral agreements provide meetings twice a year to take stock of monitoring records.

The Dutch labour inspectorate (liaison office) reported 35 reasoned requests to liaison offices in Belgium (7), Bulgaria (7); Germany (6); Poland (4); Romania (4); Slovenia (2); Slovakia (2); Cyprus (1); France (1) and Spain (1). The requests concerned the verification of the status of the worker (employee or not), and verification of personal data of posted workers and their employers, as well as the existence of significant activity of such a posting undertaking in the country of origin. A cooperation agreement with Romania on enforcement of social security and monitoring for underpayment and tax evasion was concluded in July 2010. In 2008 the Netherlands and Bulgaria signed an agreement to fight illegal labour, evasion of minimum wage regulations and abuse of social security. The cooperation consists of improved exchange of information, appointment of contact persons, joint risk analyses, comparison of files and temporary exchange of officials. This will give both the Netherlands and Bulgaria better insight into cross-border movements of workers. The cooperation will allow the Netherlands to better

¹⁴⁶ Agreement signed on the basis of ILO Agreement No. 81 on Labour Inspections.

¹⁴⁷ "Posting of workers in Luxembourg" ("Détachement de salariés au Luxembourg"), intervention of Claude Lorang, deputy director of the ITM, as part of the seminar "Assessing the implementation of the directive concerning the posting of workers in the framework of the transnational provision of services" held in Strasbourg on 25 and 26 March 2010, Slide 20 "International cooperation" ("La coopération internationale").

¹⁴⁸ Idem.

¹⁴⁹ ITM Report 2008

tackle those abuses in the labour market to which Bulgarian workers fall victim. In addition to these cooperation agreements with Romania and Bulgaria, the Netherlands has already signed cooperation agreements with Poland, the UK, Slovakia, France, Portugal and the Czech Republic

In the UK, the designated liaison officer receives very few requests. The official in question was unable to recall receiving a single inquiry relating to workers posted to the UK. Although four to five inquiries are received each year, they tend to be about workers posted from the UK.

Denmark and Sweden could report no reasoned requests. However, there is regular exchange of experiences with the colleagues in the Nordic countries on all kinds of issues, including the posting of workers.

Sending countries

The Estonian Labour Inspectorate did receive five inquiries (four from Finland and one from the Netherlands) for information about regulation of working conditions (especially as regards wages and working time, as well as the rules on occupational health and safety), the background to which involved employees and employers and copies of E-101 forms because Estonian service providers did not give the data needed. There is a cross-border agreement between the Estonian Labour Inspectorate and the Labour Inspectorate of Norway. However, this agreement is not effective because its content is out of date.¹⁵⁰

In Poland, exchange of information on posted workers with EU liaison offices involved 108 cases in 2006; 185 cases in 2007, including 30 requests forwarded by the Polish party; 185 cases in 2008, including 55 requests forwarded by the Polish party; and 136 cases until August 2009, including 70 requests forwarded by the Polish party. In the period 01.01.2007 – 31.08.2009 the largest number of requests were forwarded by liaison offices from Belgium (194 (53%)); France (77 (21%)); the Netherlands (50 (13%)); Germany (42 (11%)). Only 8 (2%) requests came in from other Member States. In the same period, the Polish Chief Labour Inspectorate forwarded most requests to the Netherlands (80), other Member States (72); Germany (45); the Czech Republic (38); Belgium (26); France (24); Spain (24); UK (19); Norway (17) and Italy (15). The following queries are most frequently forwarded to the National Labour Inspectorate in Poland:

Does the company conduct legal activity in Poland? Does the company conduct considerable activity in Poland? Does the company employ posted workers on the basis of an employment relationship? In which sector does the company conduct its activity? Does the company provide services in the context of temporary agency work, and if so has it been registered in the register of employment agencies? What working time system and daily working time norms are applicable to posted workers?

Questions on other terms of employment during the posting period include:

¹⁵⁰ This agreement is not in conformity with the ELTTS because it was concluded before the enforcement of the ELTTS.

the amount of eligible annual paid leave, the amount of paid and declared remuneration and the basis for calculating remuneration for work, pay rates for overtime work.

The National Labour Inspectorate in Poland has concluded nine agreements on cooperation with other EU Member States' authorities, including four agreements on the exchange of information concerning posted workers with the Netherlands, Norway, Belgium and Portugal. According to Polish stakeholders, the cooperation of the National Labour Inspectorate with labour inspectorates in other EU member states is assessed as effective.

In Romania, according to art. 12 par. 1 Law 344/2006, the Labor Inspectorate acts as designated liaison office, and performs information exchange with similar institutions in the EU and EEA. The Labour Inspectorate answers motivated requests for information regarding the posting of workers, including cases of abuse and illegal cross-border activities as per art.12, par.3 Law 344/2006. At the time of writing, the Labor Inspectorate has collaborated with similar institutions in Belgium, the Netherlands and France. Information regarding Romanian legislation was provided to Poland, and currently, through the EMPOWER program – *Expertise exchange and implementing actions for posted workers*, VS/2009/0476, in which the Labour Inspectorate is a partner – a closer cooperation with Italy is envisaged. No record of cross-border agreements between labour inspectorates was provided, but it was mentioned that such agreements would be useful in practice. Verifications of whether an undertaking/self-employed is properly established in the country of origin were not undertaken as there was no suspicion of the legitimacy of the documents provided.

Recognition and execution of foreign judgments and decisions

In all Member States, foreign judgments relating to infringements concerning the protection of workers can in principle be recognized according to Regulation 44/2001/EC on recognition and enforcement of judgments in civil and commercial matters, and sometimes this is (also) laid down in national Codes of Private International Law.¹⁵¹

With regard to the usefulness of the existence of Council framework decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties, the responses from the national stakeholders varied from an acknowledgement of its existence to non-awareness or non-applicability because their system does not use these penalties in the context of posted workers (LUX, IT), or because the decision is not yet transposed (BE, DE).¹⁵² Several countries, notably B, DE and NL, are debating whether administrative fines may or may not be qualified as “decisions” as defined in

¹⁵¹ Until 1 July 2007 this did not include Denmark.

¹⁵² According to a survey of the Commission in 2008, Council framework decision 2005/214/JHA is transposed in national laws by eleven Member States, four of which are countries covered by this study: DK, EE, FR, NL. See COM (2008) 888.

Article 1 of the Framework Decision. In principle, this regulation is intended for financial penalties in the context of criminal law, whereas in the Netherlands, for instance, the monetary fine that may be imposed in a labour law context has an administrative law nature. As best practice, the agreement concerning mutual administrative and legal assistance in administrative matters between Germany and Austria of 31 May 1988 may be mentioned. This makes cross-border enforcement of administrative offences possible.

As reported from France, several procedural hurdles have to be taken before a foreign judgment may be eligible for recognition and execution. According to article D.48-18 of the French criminal procedure code, in order to recognize and enforce a foreign judgement, the Public Prosecutor must qualify the facts according to the French criminal law and apply a time bar according to the latter. As a result, if the offence for which the service provider has been convicted is not incriminating under French law, there will be no recognition or execution of the foreign EU judgment. Moreover, there are other grounds that may also affect the recognition and enforcement of an EU judgment, such as public order considerations or the defendant's absence at the trial.

An observation in the Italian report is noteworthy, as it also reflects the experience in other host countries concerning difficulties in the practical application of sanctions, especially against employers established in the Eastern European countries that do not conduct relevant activities or have stable interests in Italy. In case of inspections and subsequent disputes, this kind of employer often ceases activities and disappears. None of the inspectors interviewed is aware of cases of enforcement against the employer's assets in his own country of origin as a result of sanctions by the Italian authorities. The effectiveness of the sanction regime is further reduced by the duration of the criminal procedures. Almost always the criminal proceedings against foreign employers end with the statute of limitations ("prescrizione"), given the short time frames provided for most of the penalties (two years). The Danish trade union LO also reports huge problems with actually collecting the fines imposed by the Labour Court on foreign service providers when they violate the terms of the CLA to which they are parties. LO estimates that they are aware of 45 million Danish Kroner in outstanding fines, that they have been unable to collect from foreign service providers (predominantly Polish). Thus, at the end of the day, it seems that enforcement, if any, still stops at national borders.

CHAPTER 5. Summarizing conclusions and recommendations

5.1 INTRODUCTION

This chapter provides a summary of the findings in the preceding parts of the study, followed by specific recommendations.

The main goal of this final part of the study is to determine whether difficulties and problems in implementing, applying and enforcing the PWD are caused by:

- 1 The national implementation method and/or the national application of the Directive;
- 2 The national system of enforcement;
- 3 The Directive as such; and/or
- 4 Insufficient transnational cooperation (or the lack thereof);
- 5 Other reasons.

Where possible, we provide recommendations based on this determination as to the cause(s) of an observed problem. In this regard it must be emphasized that the observed problems, causes and possible solutions are distinguished for the sake of analysis, but this does not imply that they should be regarded as entirely separate from each other.

In general, a lot of our recommendations boil down to clarification and a more precise application of the concepts and standards in the PWD in order to enhance the impact of the Directive in practice, especially when the difficulties and problems identified may be attributed to causes 1 and 3 above. The clarification must (ideally) occur mainly at EU level, while the more precise application occurs at national level.

In particular, where problems with the application and enforcement of the PWD are attributed to causes 2, 4 and 5, we may also advocate the development of new legal or policy instruments. A lot can be done at national level, but with an eye to the principle of effectiveness grounded in the TEU, legal action at European level, too, would seem to be indispensable.

5.2 THE PWD AND ITS INTERACTION WITH DIFFERENT SYSTEMS OF LAW (private international law, internal market rules and national labour law)

In Chapter 2 we described the legal background within which the PWD operates. We deem this necessary for the following reasons:

- to make clear why the PWD cannot be interpreted in isolation but must be read in connection with private international law (PIL);
- to foster a deeper understanding of the impact of the PWD on the national systems; and
- to identify problematic areas in the interaction between the systems of which any instrument on the application and enforcement of the PWD has to take account if it is to be effective.

The PWD and Art. 8 Rome I Regulation - problems inherent to the unclear interaction of these norms¹

The PWD is based on the EU competences as regards the internal market and in particular the free provision of services. This freedom attaches primarily to the service provider (and/or recipient). When the service provider needs to send employees to another Member State to be able to provide the service, the labour law of the host state may cause an impediment to this activity by creating additional burdens and costs for the service provider who is already covered by the law of another country. This obstacle can be justified by the need to protect both the labour law system of the host state against wage-based competition (social dumping) and the posted workers themselves. However, the PWD limits the possibility of the Member States (and indirectly also the unions) to avail themselves of this justification to the hard core provisions of the PWD (if necessary complemented by public policy provisions). This restriction is based on the assumption that the posted workers are already adequately protected by the law of the country in which they normally work. Often, this country will coincide with the employer's country of origin (the service provider). However, it is important to note that the assumption that the posted worker is covered by the labour law protection of the country of origin of the service provider is not necessarily true for two reasons:

- (1) The law applying to the individual contract of employment is determined by private international law (PIL), in particular Article 8 of the Rome I Regulation. This provision primarily refers to the place of *work*. When posted workers perform their work in the host state, this provision will nevertheless refer to the law of the employer's country of origin when:

¹ See more extensively Section 2.2, p. 15.

- the posted workers habitually work in (or from)² their employer's country of origin and are only temporarily posted to the host country;
- there is no country in which or from which the workers habitually work, making the employer's place of business the most relevant connection;
- the employer's country of origin is for other reasons the most closely connected to the contract. These other reasons could involve the origin of the worker, the place of recruitment, special travel arrangements and allowances to compensate the worker for working abroad etc.

Both the first and the last items of this choice of law rule can only apply if there is a genuine connection of both the worker and the contract of employment with the employer's country of origin. The rule of the closest connection also lays weight on the fact that in the case of expatriation on behalf of the employer, the employer bears the costs of labour mobility. If these requirements are not met, there is little or no justification for giving priority to the law of the country of origin. Policy makers should bear this in mind if they consider clarifying the concept of 'posting' under the PWD.

(2) Labour protection is often organized through statutes. These may have an independent scope of application in international cases. For example, as a rule the application of national rules on safety and health in the workplace do not depend on the law applying to the individual contract of employment, but rather on the actual place of work. This also means that not all national laws of the state where the worker habitually works will still apply when these workers are posted to perform work outside the territory. Hence, the law of the sending state does not necessarily protect the posted worker on all aspects covered by the PWD. This is even more true when the 'posted' worker does not habitually work there. A specific analysis would have to be made of each type of protection and each combination of countries to check whether the application of the protection of the host state in a given field of protection would lead to a double burden or rather prevent a legal lacuna. But here, too, a real and relevant link of the employment relationship to the sending state would appear necessary for achieving the purpose of the PWD.

² When the worker habitually works in more than one Member State, but has his center of activities in one of them, the law of the latter State applies. The term 'working from' does not refer to the country of origin of the employer. See for more details Section 2.2 footnote 6, p. 15.

Recommendation 1

At EU level> The present preamble to the PWD makes reference to the Rome Convention, but the exact relationship between both legal instruments is not clearly established. This makes it easy to overlook the connection between PWD and Rome Convention / Rome I Regulation, also because the ECJ did for a long time not judge PIL issues. Thus, to further a correct application of the law on posted workers, we would favour a clarification, stating that the concept of posting and the concept of posted worker in the PWD has to be interpreted in the light of the provisions of the Rome I Regulation.

In particular, it is important to ensure that the concept of posting is based on a genuine connection between the sending state and the employment contract of the posted worker. The PWD basically contains this requirement in its definition of posted worker in Article 2(1) ('posted worker' means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State *in which he normally works*). However, this provision currently lacks adequate practical enforcement and implementation.

In this context we advise to make this provision operational while drawing inspiration from Article 12(1) Regulation 883/04 and, most notably, Article 14 Regulation 987/2009. Moreover, we favour the introduction of a requirement that the employer has to bear the costs of the posting in order that the PWD be applicable (see Art. 3(7) second sentence).

See also recommendations 11-13 below.

Recommendation 2

At national level> In national law, special attention must be paid to the position of posted workers from a sending state perspective. In this regard, it is necessary to establish whether workers who are posted from that state will still be protected under its labour law, in order to avoid lacunae in the legal protection of posted workers. This recommendation seems to be especially pertinent for the UK where statutory protection largely depends on the place of work, but also applies to specific legislation in the other Member States.³ The sending state should have responsibilities not only as regards the formal applicability of its norms to posted workers, but also as regards the monitoring of compliance and – if necessary – enforcement of those norms.

See in this regard also recommendations 11, 36 and 39 below.

³ For more details see section 2.2 'double burden or prevention of lacunae', p. 18, and also below, under recommendations 11, 12, 13 at the end of section 5.3.

The PWD and national systems of labour law – problems caused by Art. 3(8) PWD and ECJ case law⁴

Under Article 3(1) host states shall ensure posted workers the terms and conditions of employment covering the matters mentioned there which are laid down in the Member State where the work is carried out:

- by law, regulation or administrative provision, and/or
- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8.

Article 3(8) specifically allows the Member States to refer to non-extended collective agreements, under the conditions mentioned therein. This provision was included in the Directive inter alia to allay Denmark's fears that the PWD would not be able to accommodate their autonomous system of standard setting.⁵ However, since the ECJ judgments in what is sometimes called the 'Laval quartet', several mechanisms which were (and still are) used in the Member States to create minimum levels of protection might be seen as conflicting with the Directive in combination with the Treaty provisions on free movement of services. This is caused in part by the wording of Article 3(8) and partly by the interpretation of Directive and Treaty by the ECJ.

With regard to the wording of Article 3(8) the following problems were reported by several national experts:

1. The provision seems to permit recourse to non-extended collective agreements only in case a Member State does not have a system for declaring collective agreements to be generally binding. If a system exists, but is not (often) used in practice, recourse to agreements entered into by the most representative organizations and/or agreements that are generally applied might be problematic.
2. The collective agreements entered into by the most representative organizations must have national coverage, excluding the referral to generally applied regional and/or local agreements.⁶
3. The ECJ lays great weight on transparency, which entails that the employer should be able to discover in advance what his obligations are with respect to collective agreements. This excludes bargaining at company level.
4. The ECJ seems to demand that the Member States explicitly base themselves on Article 3(8).
5. Moreover, the effect of the PWD on the interpretation of the Treaty provision on the free movement of services (as evident in the Rüffert and Laval cases) limits the possibility to set labour standards through other mechanisms such as collective bargaining and social clauses in contracts of public procurement.

Thus, difficulties have been reported in several countries in their attempts to reconcile the PWD and internal market case law with their system of establishing labour standards. The 'erga omnes' approach as well as the conditions laid down in Article 3(8) have given

⁴ See more extensively section 2.3, p. 22.

⁵ Ahlberg, Formula working paper Sweden 2010, p. 6.

⁶ CLAs with a more limited, local reach may be used when these are generally applicable.

rise to difficulties not only in Sweden and Denmark, with their tradition of autonomous standard setting, but also in Germany and Italy and even the UK (in sectors such as the construction industry where relatively strong trade unions still exist).

These problems are particularly severe when there is no domestic minimum wage regulation – making it perfectly legal to pay posted workers less than the prevailing local wages.

The impact of the ECJ cases can be mitigated by measures at the national level with regard to the first four problems identified above (see below recommendation 3). However, national action can not eliminate all the reported problems and uncertainties. Accordingly there is a wide array of literature and policy documents in which proposals are made to alter the text of Article 3(8) PWD. All together these documents reveal a clear lack of consensus among the Member States as well as among the different stakeholders as regards both the identification of the problems to be addressed and their preferred remedy.⁷ This lack of consensus precludes us from giving a recommendation as to action to be taken at EU level with regard to the first four problems identified here.

The situation is different with regard to the problems identified under no. 5. The case law of the ECJ in the Laval quartet has created legal uncertainty with regard to both the position of the unions/the right to take industrial action and the conformity with EU-law of social clauses in (public) procurement. This uncertainty should be remedied by action at EU level.

Regarding the position of the unions and the right to take collective action, in some national reports it was observed that the threat of an action for damages by employers which could ultimately even bankrupt trade unions, makes unions more cautious in exercising their right to strike in situations with a cross-border element.⁸ This consequence of the Viking and Laval judgments has been criticized by the ILO Committee of Experts on the Application of Conventions and Recommendations.⁹ Currently, the Member States have widely divergent rules on liability of unions and damages awarded in collective action cases. However, the rules on liability for breach of EU law are largely set at EU level. Hence, a solution to the problems which caused by the level of damages awarded, must be found at EU level, too. Finally, it is not clear how the Viking and Laval judgments must be read in the light of the recent ratification of the Lisbon Treaty which confers a binding power on the Charter of Fundamental Rights. This reinforces the status of social fundamental rights in the EU, including the “right to collective bargaining and action” (Article 28).¹⁰ The fundamental rights status of the right

⁷ See in this respect also the Report on joint work of the European Social Partners on the ECJ rulings in the Viking, Laval, Rüffert and Luxembourg cases.

http://www.etuc.org/IMG/pdf/Joint_report_ECJ_rulings_FINAL_logos_19.03.10.pdf (2010-05-15).

⁸ As reported in the UK in relation to the so-called BALPA-case (see T. Novitz, Formula paper September 2010), and in Sweden in relation to the final judgment in the Laval case of the Swedish Labour Court on 2 December 2009. See <http://www.eurofound.europa.eu/eiro/2010/01/articles/se1001019i.htm> The main issue was under which conditions a trade union shall be liable for damages.

⁹ See Report of the Committee of Experts on the Application of Conventions and Recommendations (2010), ilolex nr 062010GBR087.

¹⁰ In this regard, it is also unclear how the line of reasoning in Viking and Laval relates to recent case law of the European Court of Human Rights on the freedom of association laid down in Article 11 of the

to collective bargaining and collective action is also reflected by the fact that several Member States have indicated that their collective labour law provisions are part of public policy in the meaning of Article 3(10).¹¹

In short, the case law of the ECJ needs fine tuning in the light of the commitment to fundamental rights undertaken by the EU itself and its Member States. However, this fine tuning is unlikely to be achieved by the gradual development of case law, as unions can simply not afford to ‘get it wrong’ and thereby risk the payment of damages.

When dealing with this issue, it should be kept in mind that the position of the unions and the safeguarding of the right to strike also play a role in the interpretation of Article 3(7). With regard to Article 3(7) the ECJ has consistently held that employers can of their own accord bind themselves to apply more favourable standards to posted workers.¹² However, the ECJ has not given a clear indication as to the role collective bargaining (and hence collective action) may play in achieving consensus between the posted workers and their employer on the application of more favourable provisions. According to the authors of this study it is worth specifying to what extent Article 3(7) rather than Article 3(8) could be applicable to a situation in which the unions merely support posted workers in their negotiations with their employer on the employment conditions during the posting. Similarly, Article 5 of the PWD may be relevant when unions use collective pressure in order to ensure enforcement of already applicable rules.

Regarding the issue of social clauses in procurement contracts, a similar mix of problems arises. In its Rüffert judgment the ECJ did not discuss the specific public procurement aspects of the case, such as the impact of the Public Procurement Directive 2004/18, in particular Article 27, and ILO Convention No. 94 (C94).¹³ Thus, the relation between these instruments and the PWD (and Article 56 TFEU) is obscure and merits further investigation and clarification.¹⁴ This is all the more true as several Member States ratified C94 before their accession to the E(E)C.¹⁵ According to Article 351 TFEU (ex

European Convention on Human Rights *Demir and Baykara v Turkey*, Application No 34503/97, 12 November 2008, *Enerji Yapi-Yol Sen v Turkey*, Application No 68959/01, 21 April 2009 and *Danilenkov and others v Russia*, Application No 67336/01, 30 June 2009.

¹¹ See section 3.7 ‘Extension of the protection under 3(10) – public policy’ p. 57-58.

¹² See *inter alia* C-341/05 *Laval* para 81: “Therefore – without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a commitment made to their own posted staff...”

¹³ The fact that Germany has not ratified C94 may be the reason why neither the Advocate General in his Opinion nor the ECJ discussed the Convention. It must be noted that the referring national judge also didn’t include public procurement law in his preliminary questions.

¹⁴ Compare Niklas Bruun, *Scope of Action from a Scandinavian (Nordic) Angle*, presentation given at “The Impact of Case-Law of the European Court of Justice upon the Labour Law of the Member States - Scope of Action from a Scandinavian (Nordic) Angle” Symposium organized by the German Federal Ministry of Labour and Social Affairs, Berlin 26.6.2008

http://www.bmas.de/portal/26966/property=pdf/2008_07_16_symposium_eugh_bruun.pdf

¹⁵ Ratified *before joining the E(E)C* by Belgium (1952), Denmark (1955), Finland (1951), France (1951), Italy (1952), Netherlands (1952), Spain (1971), Austria (1951) and the United Kingdom (1950). The UK denounced ILO Convention No. 94 in 1982. Among the new Member States, Bulgaria (1955) and Cyprus (1960) have ratified the Convention. Also Norway, Member State of the EEA agreement, has ratified the Convention.

307 EC), public international law obligations undertaken by a Member State before acceding to the EU shall not be affected by the EU Treaties. However, to the extent that such agreements are not compatible with the Treaties, the Member State concerned shall take all appropriate steps to eliminate the incompatibilities established. This may result in the obligation of the Member States to denounce those treaty obligations, as has been done in the case of ILO Conventions prohibiting night work for women. According to the ECJ in *Commission v Austria* this obligation to denounce a Convention only exists if the incompatibility between the Convention and EU law has been sufficiently clearly established.¹⁶ At the moment, the exact interpretation of C94 is equally not completely clear and therefore, it is not established that C94 is incompatible with EU law and should be denounced.¹⁷

The issue of social clauses, again, has an overlap with Article 3(7) PWD. State authorities involved in public procurement do not act in their capacity as legislators, but rather as contractual counterparts. Social clauses are an integral part of ‘corporate’ social responsibility. In this regard, the Rüffert case does not only call into question the ability of state authorities to adhere to social standards in their contracting practice, but may also affect the possibility of private parties (including social partners) to do so. The overview given in section 2.3, p. 24-25, illustrates that such practices of corporate social responsibility occur in different varieties in the Member States. Thus, in our opinion, it should be clarified whether the obstacle which social clauses may cause to the freedom to provide services may be justified by overriding reasons of the general interest, taking into account the values promoted by C94.

Recommendation 3

At national level> The impact of the ‘Laval quartet’ can to some extent be mitigated by measures of national law, which would include:

- Explicit reference by the Member States to the autonomous method as a means of setting minimum standards. Currently, this point is especially relevant to the UK
- Identification of the relevant CLAs and the relevant norms within those CLAs. DK and SW are currently in the midst of this process.
- Transparency of norms contained in CLAs.
- Measures to ensure non-discrimination. This point seems most relevant to IT.

¹⁶ ECJ 30.3.2004, Case C-203/03 *Commission v. Austria* [2005] ECR, I-935, para.62.

¹⁷ The next possibility of denunciation is 20 September 2012. If this deadline passes without denunciations then the Member States remain bound to ILO Convention No. 94 until 20 September 2023. See in more detail: Niklas Bruun, Antoine Jacobs, and Marlene Schmidt, ILO Convention No. 94 in the aftermath of the Rüffert case. *Transfer: European Review of Labour and Research* November 2010 16: 473-488.

Recommendation 4

At EU level> To eliminate legal uncertainty about the meaning of the fundamental right to collective action within the context of the fundamental economic freedoms of the single market, a new legislative initiative is necessary. We recommend that the EU uses the adoption of a new legislative initiative to improve the implementation, application and enforcement of the directive to clarify the distinction between collective action meant to impose host state standards in the meaning of Article 3(8) on the one hand and collective action by posted workers in order to reach agreement on better working conditions as covered by Article 3(7) or enforce rights granted under Article 5 on the other hand. In doing so, the instrument should confirm the right of posted workers to initiate or take part in industrial actions in the host country.¹⁸ Another aspect which merits attention is the effect of damages on the effective enjoyment of the right to strike. As the right to damages for breach of EU law is largely an EU matter, any attempts to mitigate this threat should be made at EU level. It may also be worthwhile to consider the suggestion in the ‘Monti report’¹⁹ to introduce a provision ensuring that the posting of workers in the context of the cross-border provision of services does not affect the right to take collective action.²⁰

¹⁸ This (also) involves PIL-aspects which merit further investigation; Article 9 of the Rome II regulation on non-contractual obligations states that the law applicable to damages arising out of collective action is the law of the country where the action is to be or has taken place. Nonetheless, where both the employer and the worker have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

¹⁹ Modelled after Regulation (EC) No 2679/98 (the so-called Monti Regulation). See: M. Monti, A new Strategy for the single market, 9 May 2010; see also the follow-up in Proposals 29 and 30 of the Communication from the Commission, Towards a Single Market Act. For a highly competitive social market economy. 50 proposals for improving our work, business and exchanges with one another Brussels, 27.10.2010. COM(2010) 608 final.

²⁰ A further reinstatement of the freedom of the unions of the host state to induce adherence to local collective agreements (as a means of general standard setting) seems to require a rephrasing of the requirements of Article 3(8). In our opinions this could be done by replacing the current emphasis on general applicability/application by clear requirements of non-discrimination and transparency (preferably in combination with the conflict solving mechanism described here).

Recommendation 5

At EU level> To take away legal uncertainty with regard to the scope for Member States to include social clauses in public procurement contracts, this issue should be clarified not only in the light of the Rüffert judgment, but also taking into account the Public Procurement Directives which explicitly leave the Member States free to decide on how to integrate social policy requirements into public procurement procedures and ILO Convention No. 94.

Moreover, it should be clearly established to what extent the obstacle which social clauses may cause to the freedom of services may be justified by imperative requirements of the public interests, taking into account that Convention No. 94 promotes the observance of the universally applicable Fundamental Rights and Principles at Work, which are guaranteed by Article 21 and 28 of the EU Charter of Fundamental Rights.²¹

²¹ See Niklas Bruun, Antoine Jacobs, and Marlene Schmidt, above n. 17, also for a more extensive examination of this issue and possible solutions.

5.3 IMPLEMENTATION AND APPLICATION OF THE PERSONAL SCOPE OF THE PWD

Introduction

In Chapter 3.2 and 3.3 we examined problems, either on the level of the PWD or the level of its national implementation and application, in relation to the personal scope of the Directive.

The PWD aims to coordinate the laws of the Member States by laying down clearly defined rules for minimum protection of the host state which are to be observed by employers who temporarily post workers to perform services on their territory. For this type of services the PWD – in combination with the ECJ case law – creates a legal framework in which the labour protection of the host country is deemed to apply, but only to a limited extent. As described in section 3.2, the posted workers covered by the personal scope of the PWD form, in our opinion, a ‘middle’ category between (posted) workers crossing borders for only very short-term service or for other purposes than delivering services to a recipient in another Member State,²² and mobile workers who are deemed to have become part of the labour force of the host state. The last category is in principle covered by the host state laws in their entirety; the first category is not deemed to be covered by host state law.

The analysis of cases in section 3.5,²³ gives a clear indication that the cases that attract media attention and that are most controversial often pertain to situations of ‘creative use’ of the freedoms in which the provision of services is used to avoid the (full) application of the host state’s law. A clear definition of the concept of posting and of posted worker based on the *purpose* of the Directive might help to counter this. A clear definition would also help to avoid unnecessary obstacles to cross-border mobility. These obstacles do exist, but are less prominently reported, probably because they do not raise issues of what is perceived as ‘social dumping’.

Concepts of posting and posted worker in the PWD

The Directive contains a definition both of ‘posting’ and a ‘posted worker’. These definitions contain several criteria to distinguish posting from other types of worker mobility. The relevant elements are:

- 1) The posting is undertaken in the framework of transnational provision of services.
- 2) The posting can be subsumed under one of the posting types mentioned in Article 1 sub 3:
 - a) posting of workers to the territory of a Member State on the account and under the direction of the undertaking making the posting, under a contract concluded between the undertaking making the posting

²² The PWD contains a partial exemption for initial assembly and/or first installation of goods not exceeding 8 days. The national reports also mention postings for training purposes, visits to seminars etc. See section 3.2.

²³ P. 54-60, see also the references in other parts of chapter 3 and 4, notably in section 4.5, p. 142.

and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting

b) posting of workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting

c) being a temporary employment undertaking or placement agency, the hiring out of a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

3) The worker is posted for a limited period of time to a Member State other than that in which he normally works.

These requirements, in combination, are capable of distinguishing the posted worker from both the migrant worker who is fully covered by host state labour law and the worker whose presence within the territory does not trigger the application of host state labour law. However, as is dealt with more extensively below, at several points the concepts used in the PWD are unclear or tend to create confusion. Thus, situations which, from the point of view of the rationale of the Directive should be covered, may not be so covered, whereas situations which do not fit the special regime of the directive may come within its scope.

Distinguishing posting from other types of mobility - problems caused by (lack of) implementation and application at national level

As mentioned above, the Directive contains criteria for distinguishing postings from other types of mobility. However, not all Member States have included these criteria in their implementing statutes.²⁴ Several states decided to apply the relevant laws to anyone working within the territory (or similar criteria). The reported reason for this was that this has the advantage of avoiding the uncertainties that are inherent to precise definitions. However, the clear disadvantage of this method of implementation is that such wide application of the implementation measure blurs the distinction between the three categories of workers' mobility. Moreover, it is also significant to note that the possibility of partially exempting posting of short duration or insignificant work is rarely used by the Member States. Even the obligatory exemption for eight days is not implemented in every Member State. Thus, in countries that lack a well-defined concept of posting the national implementation measures may apply in situations where the necessity and proportionality of such application may be doubted.

At the same time, national experts observed a situation of what could be called 'targeted application and enforcement' in practice. In some Member States the reason for this discrepancy between the applicability of host state law 'on paper' and its limited application in practice must be sought in their legal system: namely, rights may only be

²⁴ The UK has no implementing statute but applies the relevant statutes to posted workers based on the individual scopes of application of the statutes themselves.

granted after a certain qualifying period. Such waiting periods make the immediate application (from day one) of host state statutes irrelevant in practice (e.g. in the UK). In several Member States the reason for ‘targeted enforcement’ was attributed to the lack of enforcement interests on the part of the host state (and/or the local unions) when the posting does not have an impact on the national economy and/or social peace. Only those situations which are clearly covered by the PWD and situations which are problematic from the point of view of workers’ protection and/or fair competition (social dumping) lead to enforcement activities.

A wide (non-targeted) implementation of the personal scope seems to go hand-in-hand with a rather limited (targeted) application in practice. This paradox begs for resolution. Below we give some specific recommendations, based on our analysis of the individual problems relating to some elements of the concept of posting in the PWD.

Recommendation 6

In general, we advise as action **at national level** > that Member States should bring their implementing law and the application and enforcement thereof into line with the more precise concept of posting in the PWD. Moreover, the UK should implement this part of the PWD since its failure to define posting in the context of the PWD seems to be in breach of EU law, while it is also the cause of several of its application and enforcement problems with the PWD.

Posting in the framework of the provision of services – problems caused by the Directive

As stated, the PWD applies to postings undertaken in the context of the free provision of services. Article 57 TFEU stipulates that ‘services shall be considered to be “services” within the meaning of the Treaty where they are normally provided for remuneration’. Two of the three types of posting mentioned in Article 1(3) additionally require the existence of a service contract between the employer and a service recipient operating in the host state.²⁵ No such requirement is stated in Article 1(3)(b) on intra-company transfers.

The national experts reported several problems of interpretation that directly relate to these requirements:

(1) The first one regards posting within a group of companies. This type of posting, which is specifically included in Article 1(3)(b), is often undertaken outside the context of a cross-border provision of services.²⁶

²⁵ Accordingly, the Directive seems to require (at least for two out of the three types of posting) that the worker is posted abroad to perform such a cross-border service.

²⁶ See section 3.2 for national practice. According to Deakin, in the dispute of Laval it was not clear who precisely was providing services to whom: ‘The contract for the building work was between Laval’s

(2) Secondly, the necessity of an underlying cross-border service also creates uncertainty as to the application of the PWD to workers who are posted by their employer, but do not (or only to a limited extent) perform a service. The examples given in the reports concern *inter alia* trainees.²⁷

(3) Thirdly, a strict interpretation of the requirement of a service contract between the recipient of the service and the employer would bar application of the PWD to postings in which the contract of employment is entered into by an entity distinct from the service provider. The requirement of a service contract between the recipient of the service and the employer is explicitly required in Art 1(3)(a) and implicit as regards Art 1(3)(c) postings. One example given by the national experts involves transport activities in which a forwarding agency enters into a cross-border contract of transport with a recipient in the host state whereas the contract of employment is entered into by a haulage company that does not have a contract with the recipient of the goods, but only with the forwarding agency.²⁸ Another example given concerns double posting in which the worker is 'posted' to the service provider under a domestic (or transnational) contract and then posted by the user undertaking to another Member State.²⁹ Again, there is no contract of employment between the provider of the cross-border service and the worker performing the service. There seems to be no justification to exclude workers posted under the construction described from the protection of the Directive. Given the doubts expressed by the national experts as to the proper interpretation of the requirement, it seems advisable to issue a recommendation to that effect in order to ensure uniform interpretation of the PWD in this line.

In response to the ECJ case law, Luxembourg has taken measures to specify the scope of application of their implementing law. These measures contain a specification of the service provision underlying the posting, seemingly based on EU case law on this issue. French law contains a similar specification.³⁰ Although the inclusion of a provision in national law has the merit of clarity, the EU interest requires us to note that it carries the risk of substituting a European concept for a national one.

subsidiary, a company called L&P Baltic Bygg AB (hereinafter 'Baltic'), and the town of Vaxholm. Baltic seems to have been an undertaking established under Swedish law. Perhaps Laval was providing services, not to the town of Vaxholm, but to its own subsidiary. There is no evidence of there being a contract between Laval and Baltic under which the former undertook to hire out its own employees to its subsidiary, or of it receiving remuneration from Baltic for doing so.' See S. Deakin, 'Regulatory Competition after Laval' (2008) 10 Cambridge Yearbook of European Legal Studies 581. The Advocate-General classified the situation in Laval as posting in the meaning of Art. 1(3)(b). See his Opinion, para 107.

²⁷ See for more detail, section 3.2 'provision of a service' p. 40 ff and in particular p. 42.

²⁸ Section 3.2 'International transport' – Sweden, p. 35.

²⁹ Section 3.2 'Provision of a service', p. 40.

³⁰ Section 3.2 Provision of a service, p. 41 (LUX) and p. 42 (FR).

Recommendation 7

At EU level or at national level > With regard to two types of posting, the PWD seems to require the existence of a service contract between the employer and the recipient of the service in the host state. A strict interpretation of this requirement would bar application of the PWD to postings in which the contract of employment is entered into by a distinct entity from the service provider. In our opinion the existence of an intermediary between the employer and the recipient of the services should not prevent application of the Directive in cases which otherwise fit the objectives of the Directive. Hence, we recommend to clarify this, in line with the purpose of the PWD.

To prevent employers from circumventing and abusing the rules it is necessary to establish a clear definition of "undertakings established in a Member State" (see e.g. in art 4(5) of the Services directive 2006/123/EC). Only genuinely "established" companies may benefit from the freedom to provide services and hence from the PWD.

The requirement of a cross-border service provision likewise needs clarification. A trainee is present in the territory of the host state for professional reasons, and may be benefiting from the freedom to receive services, rather than providing such. Hence, the (non-) application of the PWD to trainees and other workers *receiving* services abroad should be clearly established as well as the extent to which the PWD applies to intra-group transfers and postings.

In the absence of an EU solution, Member States could clarify these issues in their national systems, although this carries the risk of substituting a European concept for a national one.

Temporary work agencies – problems caused by EU law; variety in the level of regulation at national level

The concept of posted worker in the PWD includes the posting of temporary agency workers (Art. 1(3)(c)). However, the status of these workers in the context of the internal market is a matter of debate. In his opinion in the *Vicoplus* case, Advocate-General Y. Bot noted that although the employer is taking advantage of the free movement of services, the temporary agency worker might (also) be covered by the provisions concerning the free movement of workers.³¹ Now that the A-G's position is followed by the Court, reflection will be needed as to its consequences for the restriction on the application of host state law, which is imposed by the PWD but which does not apply to migrant workers under Art. 45 TFEU and hence should not apply to posted TWA workers.

The Directive seems to cater for this in Article 3(9) by permitting more extensive protection in the case of TWA workers. As described in section 3.7 of this study, only a

³¹ Conclusion AG 9 September 2010, Joined cases C-307/09 to C-309/09. ECJ, 10 February 2011.

few Member States avail themselves of this possibility. Article 3(9) presupposes that the domestic law of the host state contains special protection for agency workers. At the time of writing this is not true of all Member States. The TWA directive (2008/104) will create a minimum level of harmonization on this point. The extent to which the implementation of this Directive will contribute to a level playing field for TWA services remains open to question.

Article 3(1)(d) PWD includes the conditions of hiring-out of workers in the hard nucleus of protection to be offered to posted workers. The Member States differ widely in the conditions applied nationally. Whereas this service is almost completely free in some states (UK), others have restrictions on the sectors in which the use of TWA workers is permitted or the situations in which recourse can be had to TWA workers. Additionally, they may have a licensing system for TWAs or demand certain sureties. These restrictions (often enforced through public means) may be viewed as means to combat abuses, which may be missing in other Member states.³² Though application of these restrictions to cross-border posting is in accordance with Article 3(1)(d) PWD), the restrictions themselves will have to be evaluated in the light of Article 4 of the TWA Directive.

Recommendation 8

The regulation of TWA activity is within the competence of the Member States – which must of course operate within the confines of the EU Treaties. At the **European level** > the consequences of the implementation of the TWA Directive should be monitored. The relationship between the PWD and the TWA directives should be made clear, especially in regard to the question of whether Member States that apply a full equality principle (which goes beyond the minimum required by the TWA directive) can or (with regard to the ruling in *Vicoplus*) even should also impose this full equality principle on foreign service providers.

³² See section 3.3 on domestic limits to the different types of posting, p. 49, and section 3.7 on provision of manpower, p. 88.

Transport workers – problems caused by the Directive and lack of implementation at the national level

The PWD does apply to transport workers (with the exception of seagoing personnel of the merchant navy), but the system under the Directive is ill fitted to dealing with workers who do not work *in* a specific country but rather *from* a specific country. Although the PWD is generally thought to apply to cabotage activities, the exact criteria for application of host state rules is as yet unclear (France is a notable exception). Moreover, other forms of posting that are used in the transport sector may not be covered by the PWD. This creates uncertainty as to the application of the posting regime to transport workers and may lead to underprotection of transport workers. This risk is further increased by the fact that the practical enforcement of host state rules to transport workers is generally identified as problematic.

Recommendation 9

At EU level> There is reason to formulate a sub-rule for applying the PWD to transport workers. This should be the subject of further research and should be formulated in cooperation with the relevant stakeholders and experts in the field of transport regulation.

Recommendation 10

At national level> In the absence of and while awaiting a European solution, Member States may involve the national social partners in the sector to determine the proper application of the PWD to this sector.

The temporary character of the posting – problems caused by the Directive

According to Article 2 of the PWD, workers should be posted ‘for a limited period of time’ to a Member State other than the one in which they ‘normally work’. However, the Directive does not contain any indication as to the temporary nature of the posting. The temporary character of posting has two linked elements, one concerning the temporary character of the time spent in the host state, and another concerning the continuing link with the home state during the posting. During the procedure leading to the conversion of the Rome Convention into the Rome I Regulation, attempts were made to include a specification as to the temporary character of posting in Article 8 of the Regulation. The end result of these efforts has been the inclusion of a specification of the concept in the preamble. Paragraph 36 states that “work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad.” This specification emphasizes the continuing link with the home state in which the workers was working before will work again after

the posting. Contrary to Regulation 883/2004 (Article 12 sub 1) on social security, the Rome I Regulation contains no specification as to the time frame within which posting should take place. Neither does the PWD. For enforcement purposes however, the introduction of a time limit for posting under the PWD merits further study. The idea behind this is that postings of a shorter duration are supposed to fall within the scope of application of the PWD, whereas postings of a longer duration are supposed to constitute regular employment in the host state unless the employer demonstrates that the contract has retained a closer connection to the home state.³³ Such a rebuttable presumption may help to reduce formalities for short term posting, while guaranteeing effective enforcement of the temporary character of the posting. Nevertheless, care should be taken to comply with the Treaty requirements under the free movement of services.

The PWD not only does not contain any specification as to the temporary element of the posting, it does not specify either how the host state can verify whether there actually is a country in which the employee normally works. Some Member States have taken precautions to limit abusive practice (e.g. LUX, FR), which focus on the establishment of a genuine link between the employer and his country of origin. It is rare, however to find special provisions which focus on establishing a genuine link between the worker and his habitual place of employment within the said country. The ECJ does not allow Member States to request a fixed period of previous employment in the country of origin in the context of posted workers possessing a third country nationality.³⁴ This case law may be assessed as an obstacle to Member States' imposing similar requirements in the context of posting, regardless of the nationality of the workers concerned. Nevertheless, if Member States cannot impose any clear requirements as to previous employment in the country of origin, it becomes difficult, if not impossible, to assess whether the worker *normally works* in that country. The absence of any checks on the employment contract basically shifts the focus of the provision to the country of the posting undertaking's *establishment*. The introduction of such a country-of-origin rule with regard to posted workers would take the scope of application of the Directive far beyond the group originally envisaged. We therefore urge the European legislator to act, while national legislators are unable to solve this deadlock

³³ Compare on the temporary character of cabotage the Commission interpretative communication on the temporary nature of road cabotage in the movement of freight *OJ* 2005 C 021/2-7, [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005XC0126\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005XC0126(01):EN:HTML).

³⁴ See Judgments in *VanderElst* (C-43/93), *Commission-Luxembourg* (C-445/03), *Commission v Austria* (C-168/04) and *Commission v Germany* (C-244/04).

Recommendation 11

At EU-level > To enhance possibilities to combat abusive situations, the definition of temporary posting in Art. 2 PWD should be amended or clarified.

- Whether a rebuttable legal presumption of ‘structural’ employment in the host state should be introduced in case the length of employment in the host state exceeds a certain period of time (which may be partly left to the sectoral social partners to fill in, as for example in Article 5(3) Directive 2008/104 on TAW), merits further study. In any event, care should be taken to comply with the Treaty requirements under the free movement of services
- Another option would be to indicate which minimum links to the country where the posted worker normally works should exist in order for that mobility to qualify as posting under the PWD. This merits further study as well, in particular with regard to the care that should be taken to comply with the Treaty requirements under the free movement of services...³⁵
- The sending state should have a clear responsibility in preventing abusive situations as well.

See also recommendation 2 and 7 above and recommendation 36 and 39 below.

Recommendation 12

At EU level > To stress the distinction between ‘passive mobility’ of a worker posted in the framework of service provision of his employer and ‘active mobility’ of a worker, entering the labour market of another member state to take advantage of job opportunities, we advise to amend the text of Article 3(7) second sentence of the PWD by making the reimbursement of expenditure for travel, board and appropriate lodging/accommodation an obligation on the service provider.

Recommendation 13

At national level> In the absence of or while awaiting EU action, a clear understanding should be reached between enforcement authorities as to the necessary link of worker, undertaking and/or contract to the sending country. The posting declaration (former E-101 form, now A1 form) under the social security regulation may be a starting point for this discussion (see in particular Article 12 Regulation 883/04 and Article 14 Regulation 987/2009). Another indication of the fact that posting is temporary and undertaken on the employer’s account, would be the fact that the employer reimburses costs of travel, lodging and subsistence.

See also Recommendation 1 above.

³⁵ See also under section 5.2, recommendation 2 above, and section 2.2, p. 15, and p. 18.

5.4 IMPLEMENTATION AND APPLICATION OF THE SUBSTANTIVE SCOPE OF THE PWD

Introduction

In Chapter 3.6 and 3.7 we examined problems, either at the PWD level or at the level of its national implementation and application, regarding the terms and conditions of the posted worker's employment (substantive scope of the Directive). The PWD guarantees posted workers a nucleus of protection in the host state. It does not aim for, nor does it achieve equality of treatment as between posted workers and domestic ones. However, it is important to realize that as far as workers' mobility in the context of the provision of services is concerned there is no such thing as a level playing field for service providers and no such thing as equal treatment of workers. Transnational relations by their very nature are never entirely equivalent to purely domestic ones. Every regulation of transnational relations is a compromise between facilitating international transactions and guaranteeing the full application and integrity of national systems. This is a classic dilemma of private international law (PIL) which also applies in the field of the posting of workers.

The Directive contains a list of areas of protection establishing the 'hard nucleus' of protection for which Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment laid down in their laws and generally binding collective agreements. The ECJ has interpreted the Directive in such a way that the host state may only impose protection in other areas if the state can invoke the interest of public policy in doing so. This case law has several effects:

- A few countries narrowed the concept of posting in order to minimize the effect of the case law (see under section 5.2).
- The exhaustive character given to the Directive focuses attention on the limits of the concepts used therein. In particular it is becoming pertinent
 - To further define 'public policy' in the field of labour law.
 - To determine the reach of the areas of protection which are part of the hard nucleus. In particular the concept of 'rates of pay' seems to be open to interpretation.

Whereas the debate on the notion of public policy focuses on the possibility to extend the protection of posted workers beyond the hard nucleus of Article 3(1), practice on the ground reveals a more restrictive view of the protection offered. Stakeholders tend to identify a 'nucleus within the nucleus' (please note the connection with the trend of 'targeted application/enforcement', observed above). In general three areas are identified as being crucial to attain the purpose of the PWD with regard to both the protection of posted workers and the creation of a level playing field. These areas are:

- Rates of pay;
- Health and safety;
- Working time.

The other areas of protection mentioned in the Directive, such as the protection of minors, the non-discrimination rules and the protection of pregnant women and recent mothers (and even to some extent and in some countries the rules on paid holidays), are deemed to be irrelevant in practice. Be this as it may, we nevertheless examine below whether there are any problems worth noting and whether any possible recommendations can be made in this regard. First, though, we turn to the ‘crucial elements’ in the substantive scope of the PWD.

Minimum rates of pay and working time – problems caused (mostly) at the level of the PWD

Wage structures and the concept of minimum rates of pay

The PWD seems to delegate the definition of minimum rates of pay to the Member States. Moreover, the Directive specifically allows the Member States to use collective agreements as a means to establish minimum protection in the areas covered by the Directive. However, the PWD does not provide a clear answer to the question whether there can be only a single minimum wage or rather a set of rules determining the minimum rates of pay in the individual case of a posted worker. Collective agreements – and to a lesser extent even minimum wage statutes – contain wage structures which determine wages based on job classification, qualification and/or experience. With its judgment in the Laval case, the ECJ has created uncertainty about the compliance of such wage structures with the PWD. The Member States interpret their competences in this area differently – whereas Germany seems to be reluctant to apply anything but a single minimum wage, the Netherlands applies the wage structures in CLAs in their entirety. Insofar as the Directive is aimed at creating a level playing field, the application of the entire wage structure is of paramount importance. There is often a considerable difference between the statutory minimum wage and the binding wage level for a particular worker in the relevant collective agreement. Likewise, the difference between the lowest wage group in a CLA and the highest one can create a relevant competitive advantage if foreign service providers were only to respect the first, whereas domestic providers would also be bound by the second.

Recommendation 14

At EU level > It should be made clear that minimum rates of pay can be set at different levels (alternatively or simultaneously) and that each may constitute a minimum in the meaning of the Directive.

Rates of pay – constituent elements and comparison

The concept of ‘rates of pay’ seems to be crucial to the practical application and the protective effect of the PWD. However, there is at present very little clarity about the content of the concept. Moreover, there is much confusion about the standards to be used for comparing the wages actually paid by the service provider to the minimum prescribed by the host state. A related problem concerns the possibility for the posted worker to rely

on better protection offered by the law of the home state. This again creates a need for a method for comparing the levels of protection offered by the host state and the home state, respectively.

Problems identified in the reports concern inter alia:

- Contribution to funds;
- Exchangeability of special benefits;
- Special payments related to the posting and the distinction between pay and reimbursements of costs;
- Complications caused by taxes and premiums (the gross/net problem);
- Withholding of costs from the wages due to the worker;
- The possibility to combine benefits from different systems, leading to a level of protection that is higher than that envisaged under either the home state or the host state law.

Member States and social partners have taken initiatives to counter the problems caused by this uncertainty. There are initiatives intended to (better) identify the minimum rates of pay as well as initiatives for cross-border cooperation and the exchange of information on levels of protection. The focus of enforcement is on practical solutions – even if these may not fit the letter of the law. These initiatives could be further developed and intensified. However, to be more effective they need a European framework to provide greater clarity on:

- 1- the concept of minimum rates of pay;
- 2- the standard of comparison.

Recommendation 15

At EU-level > A European framework should be developed to enable Member States to articulate their standards and allow service providers easily to check the conformity of their ‘own’ employment conditions with the local rates of pay in the host state. From a practical point of view it may be a defensible tactic to allow a comprehensive comparison first and only perform an item-by-item comparison when the comprehensive comparison shows considerable discrepancies in protection. Such a practice, however, would need European backing to ensure conformity with the Directive.

Effective hourly rates

A separate problem concerns the relation between wages paid and hours worked. This problem is partly caused by the rules on minimum wages in the Member States themselves. If minimum rates are fixed by the hour, the number of hours worked directly impacts on the wages paid at the end of the day, week or month. Monthly wage rates, however, may result in very different effective hourly wage costs, depending on the number of hours worked. However, in regard to effective hourly wage costs, the greater problem seems to be the (national) supervision and enforcement of working time provisions.

This last point also holds with regard to the right to paid holidays. Though officially part of the hard nucleus, this right hardly seems relevant in practice. Posted workers tend to

take their holidays after the posting rather than during it. This makes it difficult, if not impossible, to check the effective protection of the rights acquired during posting. Only when the right to paid holidays is effectuated through a special holiday fund does the right itself and its enforcement take on practical relevance.

Recommendation 16

At national level > An hourly minimum wage rate is more effective in offering protection to posted workers than a weekly or monthly rate. Member States that currently do not have minimum hourly rates are advised to introduce these in their national laws.

Other areas of protection

Health and safety – problems of interpretation and coordination at EU level and (absence of) mutual recognition

Health and safety has to a great extent been harmonized in the EU. This does not mean, however, that workers could safely be assumed to be adequately protected by the rules of the country of origin. On the contrary, the safety of the working environment is primarily determined by local conditions. Rules of the *home* state with regard to specific conditions in the workplace may not apply extraterritorially. Hence, often only the local rules of the *host* state are relevant in practice. In this respect the rules on safety and health are different from those on pay and working time, where both the law of the home state and the law of the host state may apply. The need for government supervision of safety and health implies host state involvement with safety and health, as do the special provisions on safety and health in shared workplaces³⁶ and mobile construction sites.³⁷ The main difficulties that arise in practice in this area relate to the practical enforcement of safety regulations and effective communication in a multilingual working environment.

Moreover, health and safety regulations of some of the Member States also contain obligations and rights which may cause problems of coordination and of mutual recognition and raise questions as to their compatibility with prevailing EU law in transnational cases. These problems arise in particular when Member States require certificates regarding training and qualification on the one hand, and health status on the other. These problems would be resolved to a great extent if all Member States had similar systems of certification and the certificates were mutually recognized. However, neither is the case, whereas the compatibility with EU law also merits further examination.. Member States that impose specific requirements in these areas and hence have to deal with the problem of (an absence of) mutual recognition include France, Italy and Luxembourg .³⁸

³⁶ Directive 89/39/EC.

³⁷ Directive 92/57/EC.

³⁸ See section 3.7 ‘Structure of the health and safety regimes’, p. 79.

A different problem of coordination arises with regard to liability for accidents and insurance against occupational risks. The Member States have divergent systems for dealing with occupational risks, varying from wide coverage through social security (sometimes in combination with a bar on civil liability e.g. Germany, Denmark), coverage through tort law, sometimes with special rules on the burden of proof (e.g. the Netherlands, Romania), and coverage by special compulsory insurances (often contained in collective agreements, e.g. Sweden).

Recommendation 17

At EU level> A clarification of the notion of safety and health in Article 3(1) may remedy the confusion caused by the fact that the notion may cover different elements such as on-site protective measures, health checks and training, as well as (in the Netherlands, for example) liability for industrial accidents. The relationship with other systems of protection (e.g. social security) should be clarified.

Recommendation 18

At national level > Member States should as far as possible apply the rules of mutual recognition to each other's system of training and health care. This requires cooperation and exchange of information between the authorities involved.

Protective measures for pregnant women – problems of interpretation and coordination

The rules on special protection of pregnant women and recent mothers (including maternity leave) are harmonized at minimum level by European directives. Despite rather complicated problems of classification and comparison, which will be briefly explained below, it should be noted that maternity leave is not reported as problematic by the national stakeholders. The problems involved may arise mainly in long-term postings which are not terminated when the worker takes an extended leave.

Minimum harmonization at EU level does not prevent considerable differences at the national level, especially in the area of leave related to child birth and the raising of children (maternity leave, parental leave etc). Especially with regard to the latter type of protection, the problem of characterization arises. Maternity leave has elements of safety and health, e.g. when women are no longer permitted to work in the last stage of pregnancy, or when certain type of activities are prohibited. But more important are the right to take a leave of absence and the right to payment during this leave. Associated rights are the right to return to a similar job after leave, continued seniority, and protection against dismissal during leave.

One could defend the position that all these elements are part of the special protection of pregnant women and recent mothers, as protected by Article 3(1)(f). But these rights may also be characterized as pertaining to equal opportunities legislation, to working time and safety and health, to contract law, or to social security. Payment during leave in particular

may cause complications as this may be based on social security, contract law, special funds in collective agreements, or a combination of all these methods. Social security is regulated by its own system of coordination. Application of the host state law to posted workers may interfere with this system of coordination.

A special problem is caused by the method of comparison with regard to the protection offered in the field of maternity leave and parental leave. Should the length of the leave be compared independently of the level of pay during leave? Such provision-by-provision comparison could lead to benefits envisaged by neither system (cherry picking). But it will be difficult to compare objectively a long leave of absence against diminished pay with a shorter leave against full pay.

Although there is probably no great sense of urgency in regard to this subject, nevertheless the following recommendations may be considered, if only in the slipstream of legislative activity on other elements of the PWD:

Recommendation 19

At EU level > With respect to the protection under the heading of Art. 3(1)(f), a clarification of the contents of the special protection offered in this provision would be welcome.

Recommendation 20

At EU level > As far as is relevant in light of the first recommendation, a clearer demarcation between the PWD and the Regulation 883/04 on coordination of social security with regard to maternity leave would be welcome.

Recommendation 21

At EU level > Depending on the outcome of the previous two points, it may be important to establish a method of comparison with regard to the protection offered in the field of maternity leave and parental leave, in particular how a longer leave against a lower remuneration/benefit should be compared to a shorter period of leave against a higher remuneration/benefit.

Protection of minors and non-discrimination

The national laws with regard to the protection of minors and non-discrimination are based on European directives. The main conclusion that can be drawn from the national reports is that these aspects of the protection offered by the PWD are not relevant in practice.

Extension of protection under Article 3(10) – interpretation and application

The concept of public policy has become highly controversial after the judgment in case C-316/09 (Commission v. Luxembourg). Several Member States were confronted with an interpretation of the concept of ‘public policy’ in the PWD which seems to differ rather drastically from the notion of public policy/ordre public in their labour law and private international law systems.³⁹

It is important to note, though, that the relevance of Article 3(10)(first indent) is directly related to the interpretation of the heads of protection under Article 3(1). This is demonstrated by the practice of the Member States which is described in more detail in chapter 3.7, p. 89-90. The national reports contain several examples of protection which – awaiting further clarification of the terms used - could be either included in the notion of public policy or subsumed under one of the heads of protection mentioned in Article 3(1). Sweden does not base itself on Article 3(10) to justify the application of its statutes on part-time and fixed term work, because these are deemed to be covered by Article 3(1)(g). Conversely, another state (France) did notify the application of their holiday funds under Article 3(10), believing them to be covered by that provision rather than Article 3(1)(b). A further clarification of the other heads of protection would be a first necessary step in the delineation of the scope of application of Article 3(10).

Not all Member states report the application of their ‘public policy’ laws to the European Commission. This lack of precise information on the content of national rules which are given a public policy status, makes it hard to evaluate the necessity to change (the current interpretation of) Article 3(10). Hence, the second step in the evaluation of Article 3(10) consists of a (more precise) inventory of provisions which are applied to posted workers but cannot be subsumed under one of the other heads of protection. These rules can only be applied when they are attributed a public policy status.

Finally, a lot is still unclear about the exact interpretation of the public policy provision in the PWD. Generally, collective rights, especially the right to collective negotiation and collective action, are deemed by the Member States to fall within the concept of public policy. This is supported by ECJ. However, the concept has only been clearly delineated in the context of migration law. The PWD operates in the context of PIL, in which the concepts of ‘ordre public’/public policy may take on a different meaning. There is currently a lack of clarity as to the exact relation between overriding mandatory provisions (loi d’ordre public) and public policy in PIL on the one hand, and the concepts of imperative requirements of the public interest and public policy in the framework of the internal market.⁴⁰ The inventory of national rules applied under Article 3(10) could

³⁹ See inter alia H. Verschuere & M.S. Houwerzijl, *Toepasselijk arbeidsrecht over de grenzen heen*, België, Nederland, Europa, de wereld, Serie Onderneming & Recht deel 48, Deventer: Kluwer 2009.

⁴⁰ See inter alia Com(2003)458 p. 13 for an indication of the confusion caused by the overlapping notions. For an assessments of the impact of PIL on the current interpretation of Article 3(10) see inter alia C. Barnard *The UK and Posted Worker*, ILJ Vol 38, 2009, p.130; and A.A.H. van Hoek, *Openbare orde, dwingende reden van algemeen belang en bijzonder dwingend recht, De overeenkomsten en verschillen tussen internationaal privaatrecht en interne marktrecht*, in: H. Verschuere & M.S. Houwerzijl,

provide a point of entry for the Commission to seek further clarification of the concept of public policy from the ECJ.

Recommendation 22

At EU-level> Clarifying the scope of application of the heads of protection mentioned in Article 3(1) will help clarifying the remaining scope of application of the public policy provision in Article 3(10) (first indent).

Recommendations 23

At national level> Member States could help to clarify the scope of application of the heads of protection mentioned in Article 3(1) and the scope of application of the public policy provision in Article 3(10) (first indent) by more explicitly referring to the relevant provisions in their implementation. Besides this, a more detailed identification of applicable provisions will help illustrate the breadth of the concepts used in the Directive.

Recommendations 24

At EU-level> The concept of public policy is used both in the context of the free movement of services and in the context of private international law. It is currently unclear whether the concept of public policy used in the case law on free movement of services is also valid in the context of the Rome I Regulation and if not, what impact the PIL concept may have on the interpretation of the PWD. Thus, further specification of the concept of public policy, taking into account the PIL context of the PWD, seems necessary.

5.5 Actors involved in application and enforcement of the PWD and their (cross-border) cooperation⁴¹

This section and the next deal with the topics examined in Chapter 4. In contrast to the provisions in the PWD with regard to the personal and substantive scope of the Directive, the PWD contains neither guidance nor minimum requirements regarding the level/nature of monitoring and enforcement (Article 5). Moreover, only very few requirements are stipulated regarding the provision and exchange of information (Article 4) and legal remedies for posted workers and/or their representatives (Article 6). Thus, at present, the monitoring and enforcement of the PWD will in principle be largely (if not entirely) based on the level provided in the domestic system. This is problematic, since the national reports clearly reveal and expose the weaknesses in the national systems of labour law and its enforcement in relation to vulnerable groups in the labour market, such as (certain groups of) posted workers. Compliance can and should therefore be strengthened by the implementation and application of several monitoring and enforcement ‘tools’, as listed below. But at what level should this be done?

In general, compliance with EU law is based on a decentralized system of enforcement, which means that EU law is predominantly applied by the national authorities and adjudicated by the national courts according to the national (procedural) rules. However, this does not (necessarily) mean that the responsibility of the Member States to guarantee compliance to EU law should stop when the limits of their own system are reached. In fact, as may be gathered from the case law of the ECJ, the Member States have a responsibility to guarantee the ‘effet utile’ of EU law. This is based on the so-called principle of effectiveness grounded in Article 4(3) sentences 2 and 3 of the TEU (old Art. 10 EC). In line with this principle, Member States need to implement, apply and enforce effective, proportionate and dissuasive sanctions to guarantee compliance with EU-rules, such as the PWD. Therefore, the current situation where the weaknesses in the national systems of enforcement are also weaknesses of EU law on the posting of workers, does not have to be accepted as a ‘fait accompli’ but, as far as feasible, may and should be reversed.

In this regard, some help at European level would appear indispensable. Preferably, national tools and rules on enforcement should be embedded in a European framework of legislation and cooperation between the main actors involved, in order to achieve an effective level of compliance with the PWD on the one hand and to prevent unfair competition and legal confusion hampering the cross-border provision of services on the other.

⁴¹ See sections 4.2 and 4.6.

Involvement/cooperation of national authorities – problems caused by differing national traditions and ‘silence’ at EU level

Actors involved

The overview of national actors involved in monitoring and enforcement reveals a rather heterogeneous picture, which may not be assessed as ideal from the point of view of enhancing the free provision of services nor from the point of view of the other aims of the Directive, which are the protection of the posted workers and the need to sustain fair competition. However, this situation reflects the choice in the PWD to leave monitoring and enforcement of the rights conveyed in the Directive fully to the national level (see Article 5), without any detailed requirements or guidelines (of minimum harmonization) as to the appointment of certain responsible actors and their tasks. In that sense, the problem is caused not by one factor alone, but instead by the ‘silence’ at EU level combined with the application/enforcement of the PWD at national level. Nevertheless, the fact that the Directive is not more explicit or even silent, does not imply that Member States should not respect prevailing EU law as interpreted by the Court while applying national monitoring and enforcement instruments/systems.

Situations where multiple authorities are involved (Belgium, Italy, Germany) or (officially) no authority at all (UK), may be assessed as especially problematic. Moreover, the extent to which public authorities are involved in monitoring/enforcing labour law differs. In this respect, the vulnerability of systems that rely too much on private law enforcement is revealed (once again), since it may lead to (abusive) situations of non-compliance where unreliable service providers are involved.⁴² At a certain point, this may be assessed as endangering the ‘effet utile’ of the PWD, which runs counter to the principle of effectiveness grounded in the TEU (as referred to above).

Recommendation 25

At national level > Create more transparency in the monitoring systems of the countries mentioned above, by appointing one authority as the first contact point/first responsible actor in respect of monitoring the rights conveyed by the PWD and/or the presence of posted workers. Implement – if politically feasible – more public enforcement in case the national system prevents the adequate enforcement of rights for posted workers which may endanger the ‘effet utile’ of the PWD.

⁴² This applies for countries such as Sweden and Denmark, but also the Netherlands, the UK and even Germany specifically with regard to Health & Safety law.

Recommendation 26

At EU-level > Stipulate in a recommendation or in a legal instrument that one government agency at national level should be the first contact point/first responsible actor on posting of workers issues. Furthermore (if it is assessed that effective measures cannot be sufficiently achieved at national level), it could be stipulated in a legal instrument that sanctions based on private law alone are not likely to be sufficient to deter certain unscrupulous employers. Thus, compliance can and should be strengthened by the application of administrative or, in some situations, even criminal penalties.

Focus of the monitoring and enforcement activities

In all countries except Germany, it seems to be the case that monitoring and enforcement competences and activities are first and foremost targeted at monitoring compliance with national labour law in general. Thus, no enforcement capacity is specifically allocated to monitor compliance with *the rights* conveyed in the PWD. As a result, inspecting bodies act within their ordinary prerogatives, which means in practice that they essentially interpret existing national labour law following both “local practices” and domestic policy guidelines, with no or only limited awareness of the presence and the specific legal situation of posted workers. This is different in regard to monitoring *the presence* of posted workers, which entails a more ‘migrant law’-style of supervision (namely on access to the territory of a state). In this context, specific monitoring and enforcement tools targeted at the posting of workers do exist in several Member States.

Recommendation 27

At national level > A closer focus is needed in the national authorities’ monitoring and enforcement policy. This can be achieved by issuing inspection guidelines specifically targeted at posting of workers situation. In this respect, the question whether a requirement on service providers to simply notify the presence of posted workers may be justified and proportionate as a precondition for monitoring the rights of posted workers, merits further study. It may help the national actors to detect posting of workers situations and it gives insight into the size and occurrence of this phenomenon at sectoral level.

Recommendations 28

At EU-level > Since the enforcement bodies in the Member States do not specifically focus on the specific legal position of posted workers and thus tend to overlook them, a more targeted focus on this group can also be furthered by appointing a taskforce and/or issuing inspection guidelines specifically targeted at posting of workers situations at EU level. Possible sources of inspiration: Osha (European Agency for Safety and Health at Work); SLIC; Europol; Administrative Commission in the context of social security coordination.

Domestic and cross-border cooperation

Despite considerable progress, the internal cooperation between national authorities responsible for monitoring the labour law, social security law and tax law position of posted workers and their employers still displays serious shortcomings. While in some Member States there is still no or only limited systematic cooperation, in others there is a clear gap between cooperation on paper and cooperation in practice. The same holds for cross-border cooperation between the national authorities involved in PWD-related monitoring/enforcement issues. The difficulties of cross-border cooperation are increased by the differing functions performed by the competent authorities in the various countries. (What the Labour Inspectorate does in one country may belong to the competence of Tax authorities or Ministry of Finance in the other.)

Recommendation 29

Further implementation/application of initiatives **at EU and national level** already taken with regard to the enhancement of both domestic and (bilateral) cross-border cooperation between inspectorates is indispensable. It depends on the situation in each Member State what concretely should be done from an operational point of view. To keep authorities continuously focused on the need for a smooth and effective cooperation, we advice to evaluate and monitor the situation on paper and in practice regularly (for instance once or twice a year).⁴³

Recommendation 30

Several countries reported a shortage of staff involved in monitoring and enforcement tasks, which may have adverse effects on the frequency of controls. In order to meet or sustain a satisfactory level of effective, proportionate and dissuasive enforcement, these shortcomings should be dispelled by **national** efforts (recruiting more qualified inspectors and setting targets for a certain number of inspections, based on risk assessment) **and/or at EU level** by stipulating minimum standards in this respect in a legal instrument.⁴⁴ The additional advantage of a measure at EU level would be that it may reduce as far as possible the huge differences between the Member States in the level of enforcement of the rights conveyed in the PWD.

Involvement of social partners – problems caused at national level

Apart from the Nordic countries Denmark and Sweden, social partners are involved in monitoring / enforcing the rights of posted workers and their presence only to a very minor extent. In all countries it was observed that they lack sufficient (financial) sources

⁴³ See in this respect Commission's Recommendation of 31 March 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services and Commission's communications COM (2006) 159 final 4th April 2006 and COM (2007)304 final, 13 June 2007. See Chapter 4.6, p. 154 ff, on the national initiatives.

⁴⁴ Directive 2009/52 may serve as a source of inspiration in this respect.

and access to data necessary for the adequate performance of their tasks. Since most authorities do not feel (especially) responsible for monitoring compliance with labour law at CLA level, nor do they cooperate very smoothly with social partners, this situation leads to a clear absence of monitoring and enforcement of rights at CLA level.

Recommendation 31

More (e.g. financial as well as institutional) support **at national level** together with more supervision / stipulation of minimum standards **at EU-level** for adequate monitoring / enforcement of rights, is necessary. In this regard, countries may also learn from each other's 'best practices', such as the requirement in Estonia that a supervisory authority must reply to a written appeal by a trade union in regard to violations of labour law no later than within two weeks. Other inspiring practices may be found in the Italian report on (support for) local trade union initiatives and in the Dutch report on 'compliance offices' set up by social partners to monitor compliance with their branch CLA.⁴⁵

Other issues

Posted worker or (posted) self-employed?

A specific problem related to monitoring the terms and working conditions of posted workers is the difficulty which is sometimes experienced by authorities of distinguishing between a (posted) worker and a self-employed person (service provider). This may be problematic even in purely national situations, but in cross-border situations the problems are even worse, since different legal regimes may apply to those categories. With regard to the applicable social security system, the Member State in whose territory the person concerned is normally (self-)employed is responsible for (issuing the E 101 certificate) determining the nature of the work in question. Consequently, in so far as an E 101 certificate establishes a presumption that the self-employed person concerned is properly affiliated to the social security system of the sending State, it is binding on the competent institution of the host state.⁴⁶ In the context of the PWD it works the other way around: Article 2(2) PWD stipulates that the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted. Hence, the nature of the work in question should be determined in accordance with the law of the host state.⁴⁷ For labour law purposes a comprehensive judgmental view on an individual basis is necessary in each country. However, the burden of proof is sometimes very hard. In this regard, in the Netherlands, a legal presumption applies of the existence of an employment relationship, in the situation that someone has worked for someone else for a duration of at least three months, on a weekly base or at least 20 hours a month, against remuneration paid by the other. In that case the burden of proof is on the employer to rebut this legal presumption. This good practice may inspire other Member States to implement similar provisions.

⁴⁵ See section 4.2, p. 98 under social partners' involvement.

⁴⁶ Case C-202/97 (Fitzwilliam Executive Search), para 53, Case C-178/97 (Banks), para 40.

⁴⁷ For more details see Chapter 4.6, p. 146-147.

It must be noted though that a similar (albeit more stringent) legal presumption in French law was considered to constitute a disproportionate restriction of the free movement of services incompatible with EU law as interpreted by the ECJ in the context of Regulation 1408/71 (now Reg. 883/04).⁴⁸ Even if this judgment would make Member States hesitant to adopt a legal presumption of an employment relationship in certain situations of posting, the European legislator could still consider this option. This again highlights the problems Member States experience in effectively monitoring the proper application of the Directive without violating EU law.

Recognition and execution of foreign judgments

Despite EU measures in the field of recognition and execution of foreign judgments and decisions, the enforcement of rights conveyed by the PWD still seems to stop at the national frontier.

Recommendation 32

In part this is due to legal lacunae, and to that extent additional measures should be taken **at national** and also **at EU level** to enhance the cross-border recognition and execution of penalties in the context of the PWD (for more detail see the last part of section 4.6, p. 168).

⁴⁸ As interpreted by the ECJ in the context of Regulation 1408/71 (now Reg. 883/04). See Case C-255/04, *Commission v. France* [2006] ECR-I 5251, para. 48-49. See also Chapter 4, p. 157-158.

5.6 Tools used for information⁴⁹/ monitoring / enforcement⁵⁰ purposes, and remedies⁵¹ available to posted workers

Dissemination of information – problem caused by national practice

Access to information in the host country

As Chapter 4 made clear, in practice the dissemination of information by the responsible authorities focuses on statutory rights only. In comparison to a few years ago, a lot of progress has been made in this respect (especially in regard to multi-language information), although further efforts to improve accessibility, sufficiently precise and up-to-date information remain necessary, particular in Italy and at EU level. However, the social partners – in practice mostly the trade unions –, are also involved in offering information about the applicable CLA provisions. According to the text of Article 3(1) PWD, the Member States would be responsible, and therefore they only delegate part of the tasks to social partners, without any supervision. In practice this division of responsibilities leads to a situation of too little information about the entitlements of posted workers at CLA level. Only in Denmark, the Netherlands and Sweden have initiatives been taken to identify the applicable rules regarding the hard nucleus listed in Art. 3(1) PWD at CLA level and subsequently to make this information accessible.

Recommendation 33

At national level > Continue the efforts to improve access to and content of the information on host country labour law standards, especially respecting entitlements in CLAs. **At EU level**, these efforts can and should be facilitated as far as possible (best practice of social partners at EU level: EFBWW/FIEC joint initiative), by practical measures and/or legislative amendments, stipulating more detailed minimum standards than in the current Art. 4(3) of the PWD.⁵²

⁴⁹ See section 4.3.

⁵⁰ See section 4.4.

⁵¹ See section 4.5.

⁵² See in this respect Commission's Recommendation of 31 March 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services, under point 2 (on access to information).

Recommendation 34

In almost all countries websites are the most prominent means for the dissemination of information. If too little (clear) information was available through internet before 2006, now it sometimes seems to be the opposite: too many sources of information may also endanger transparency. In this respect it is recommended that authorities designate one website/webgate as the central entry point for the provision of information on posting of workers in the context of the PWD, at **both European and national level**.⁵³

Recommendation 35

Next, it should be noted that posted workers, in particular those in the lower segments of the labour pool, may not have internet access. In this respect adequate information on paper and special information and awareness-raising campaigns focused on posted workers will remain indispensable, which several Member States have put into practice. However, such special grass-roots projects are costly and time consuming. To promote and sustain such initiatives, financial support and facilitation **at EU and national level** is an absolute prerequisite.

Access to information in the sending state

Currently, not much is done at national level to make information on terms and working conditions in host states available in the workers' country of origin before they are posted. In this respect, the scarce initiatives of host states to target information at workers and firms in the sending countries (through their embassies, for example) deserve following, since awareness raising should be started as early as possible to make 'informed posting' possible. To further this goal, the authorities in sending countries should also be addressed. Pursuant to Article 4 of Directive 91/533, employers have a duty (in addition to the obligation stemming from Article 2 to notify an employee in writing of the essential aspects of the contract or employment relationship including level of remuneration – basic amount and other components – paid leave, length of the working week, applicable CLA) to inform a worker who will be posted longer than one month before his departure on at least: (a) the duration of the employment abroad; (b) the currency to be used for the payment of remuneration; (c) where appropriate, the benefits in cash or kind attendant on the employment abroad; (d) where appropriate, the conditions governing the employee's repatriation.

⁵³ Inspiration may be drawn from the setting up of 'Points of Single Contact' (PSCs) in the context of Directive 2006/123 (services Directive).

Recommendation 36

National level > In the countries covered by this study this obligation seems only to be subject to supervision by the Labour Inspection in its role as a sending state in Estonia. Here, failure by an employer to submit information is punishable by a fine. This good practice deserves to be followed by other Member States in their role as a sending state, to underscore their duty as regards information on constituent elements of posting.

At **EU level**, amending Directive 91/533 is highly recommended, in order to establish effective and dissuasive sanctions in case of non-compliance with the obligations laid down in Articles 2 and 4 of this Directive and to extend its scope to all situations of posting covered by the PWD, regardless of the intended duration of the posting. Additionally, the service provider may be obliged to submit his written statements to his employees in accordance with Directive 91/533 also to the competent national authorities in the host and/or sending state.⁵⁴ In case authorities in the latter state would be made primarily responsible, the cooperation with the competent authorities in the host state should be clearly established.

See in this regard also recommendations 2 and 11 above and recommendation 39 below.

Duties on service providers – problems caused at national and EU level

Notification requirements

In five of the nine predominantly hosting states covered by this study, notification requirements for posting of workers are imposed on foreign service providers in order to enable the responsible government agencies to fulfill their monitoring and enforcement tasks. These systems may appear as a good practice in the sense that the introduction of some kind of notification system seems to be a precondition for monitoring and enforcement efforts (as explained in Chapter 4.2). This does not mean that it is an infallible instrument; first of all notification requirements may cause problems of compatibility with EU law (i.e. be disproportionate); secondly many national stakeholders point to the problem that a lot of service providers ‘forget’ to notify. Nevertheless, they all seem to agree on the advantages of this instrument with regard to facilitating enforcement and also for policy purposes. Indeed, effective policy making is impossible when no reliable data exist about size and character of the phenomenon of posting in the framework of the PWD. The advantages seem to outweigh the disadvantages, especially when a user-friendly and easy accessible system is implemented, as in Belgium. The notification systems as applied to posting of workers in Belgium and Denmark may be labeled good practice with regard to the exemptions they contain for insignificant and specific postings as well as, in Belgium, exemptions from

⁵⁴ An obligation to submit conformal certificates to the directive 91/533 EC, or the written working contracts (copies are sufficient) of the posted workers currently exists in Luxembourg and Germany (as host states). See Chapter 4.3, p. 112 ff.

more far-reaching information requirements.⁵⁵ Such tools may act as an incentive for service providers to notify. The requirement in Germany and Luxembourg to submit the documents service providers have to provide to their employees pursuant to Directive 91/533 and, in Luxembourg, the possibility for ‘repeat players’ to submit only a ‘light declaration’ may also be shared as good practice, subject to further assessment in the light of the case law of the ECJ.

Recommendation 37

National level > The initiatives to enact a notification system for service providers in a majority of host states covered by this study merit further study.

Recommendation 38

From an EU perspective, notably with regard to further cross-border service provision, the differences between Member States with and without notification systems may create confusion and uncertainty, as also may the different content of notification requirements in force. Whether it would therefore be recommendable to coordinate a notification system **at EU-level**, by laying down at least the minimum and maximum requirements of such a system merits further study, notably with regard to the effectiveness and proportionality of such a tool, as well as its implications from an administrative burden point of view. In this respect, inspiration may be drawn from Directive 2009/52 and from the old proposals to adopt a residence Directive for posted workers (note that both are/were only meant for workers with a third country nationality, which may put the protection of intra-EU posted workers at a disadvantage).⁵⁶

Additional requirements

There are also differing situations in the Member States with regard to additional requirements, such as the need to request prior authorization or to keep employment documents available for the authorities, or to appoint a representative, which may in certain cases be in breach of EU law.⁵⁷ A lot of differences also exist between the Member States concerning the severity and content of penalties and fines. In this respect it was (roughly) assessed that Luxembourg seems to have the best balanced penalties, as regards proportionality on the one hand and dissuasiveness on the other. No administrative fines are imposed there, but rather a lot of compliance orders.⁵⁸ A clear advantage of this mode of sanctioning is that it avoids a lack of result ‘at the end of the day’, as was noted in some other Member States (Belgium, France, Italy) which rely

⁵⁵ Please note that this qualification of the Belgium system as a best practice is restricted to the notification with respect to posting of workers. See pending ECJ case 577/10 as regards the compatibility with Article

⁵⁶ TFEU of the same registration/notification as applied to self-employed.

⁵⁷ See COM (1999) 3 and COM (2000) 271.

⁵⁸ See in this respect the guidance of the European Commission on the case law of the ECJ with respect to control measures concerning the posting of workers in COM (2006) 159.

⁵⁹ See on this use of compliance orders in Luxembourg, Chapter 4, p. 119 ff. A recently adopted ‘warning act’ in Italy may, if applied in practice, have a similar effect.

foremost on criminal penalties. Disadvantage of this mode of sanctioning is however that, a statement of offence does not necessarily lead to prosecution since the prosecutor does not seem to give priority to offences related to the posting of workers.

Recommendation 39

At national level > Exchange of best practices with regard to ‘balanced’⁵⁹ additional duties on service providers is recommended. Preferably however, **at EU-level** uniform documents with regard to information duties on service providers should be developed (or to insist on multipurpose use of the written statements required in Art. 2 and Art. 4 of Dir. 91/533).

See in this regard also recommendations 36, 11 and 2 above.

Self-regulatory duties on service providers

Recommendation 40

In some Member States (Denmark, Italy, the UK), collective agreements also impose duties on foreign service providers, such as to provide pay receipts and employment contracts or documentation on the terms of employment upon request to the local branch of the trade union. Such initiatives, self-evidently to the extent that the content of the CLA measures is not disproportionate or in breach of EU law, may be welcomed and shared as good practice as a tool to enhance compliance with the PWD at the level of CLAs.⁶⁰

Complaint mechanisms for service providers

Foreign service providers may contact the national contact points of the Internal Market Problem Solving Network (SOLVIT) with complaints about the application and enforcement of the rules on posting of workers by the authorities. It seems that this complaint mechanism has worked satisfactorily, especially in Poland, but in the majority of Member States covered by this study it was found that the mechanism is not very well known and may be underused. Apart from that, it proved very difficult in several Member States to get access to information about the nature of complaints from the SOLVIT agencies.

⁵⁹ Between excessively rigid (disproportionate) and overly loose (not dissuasive or deterrent) rules.

⁶⁰ In that sense, the Dutch Foundation of Labour advised sectoral partners to adopt such measures (2007 handhavingskader grensoverschrijdende arbeid).

Duties on recipients of services – a way forward to solving problems at national and/or EU level?

Information requirements

In some countries (Belgium, Denmark with regard to certain risk sectors), recipients of the service have to check whether foreign service providers, notably in their role as foreign subcontractor(s) / temporary staffing agency, have complied with their notification duties. In case of non-compliance the recipient / user undertaking has to report this to the competent national agency. If the service recipient reports the non-compliance, he is freed from liability but may otherwise be fined. Some duties of information on the recipient of the service are also in place at CLA level, notably in the construction sector, stemming, for example, from the implementation of Directive 92/57/EEC on minimum safety on building sites.

Assessment

Given the problem observed in several Member States of service providers that do not register, it is understandable that the service recipient is made co-responsible to a certain extent. Thus, to enhance the effectiveness of notification schemes these initiatives may be welcomed, (self-evidently) provided that the content of the measures is not disproportionate⁶¹ or in breach of EU-law, and shared as good practice, namely as a tool to enhance compliance with the PWD, including the CLAs level. See in this regard the judgment of the ECJ in the case *Wolff & Müller*.⁶² Here, the Court stated (at para 37) that, if entitlement to minimum rates of pay constitutes a feature of worker protection, procedural arrangements ensuring observance of that right, such as the liability of the guarantor in the main proceedings, must likewise be regarded as being such as to ensure that protection. Nevertheless, the compatibility with EU law notably with regard to the effectiveness and proportionality of such a tool and the implications from an administrative burden point of view merit to be further examined.

⁶¹ In this respect, an exemption or ‘light’ procedure may be considered for service recipients who are natural persons and where the employment is for their private purposes.

⁶² Case C-60/03 *Wolff & Müller* [2004] ECR I-9553.

Liability (or ‘functional equivalents’) with regard to pay and pay-related contributions/tax

In five of the nine predominantly host countries (Belgium, France, Germany, Italy, the Netherlands) in our study legal (sometimes combined with self-regulatory) mechanisms of ultimate liability, in particular joint and several liability schemes concerning the clients/main contractors/user companies, are in place to prevent the non-payment of wages (all but Belgium), social security contributions (all) and fiscal charges (Belgium, France, the Netherlands and partly Denmark). Several tools have been developed either to prevent the possibility for liability among the relevant parties or to sanction those parties that do not follow the rules. These preventive tools may be aimed at checking the general reliability of the subcontracting party and/or to guarantee the payment of wages, social security contributions and wage tax. Parties that do not abide by the rules on the liability arrangements in place may be sanctioned through a number of *repressive tools*, namely: back-payment obligations (Denmark, France, Italy, the Netherlands), fines (Belgium, Denmark, France) and/or alternative or additional penalties (Germany, France, Italy). In other host states (notably Sweden, Luxembourg, in a way also the UK) alternative measures with the same aims are also in place.⁶³

With regard to liability requirements, the same assessment applies as stated above in regard to information requirements imposed on service recipients.

Recommendation 41

The feasibility of adopting minimum standards **at EU-level** with regard to duties (including joint and several liability) on service recipients in the context of the PWD merits further study, notably with regard to similar obligations in place in Member States not covered by this study and the effectiveness of these tools.⁶⁴

⁶³ See section 4.4 for more details.

⁶⁴ See the study on ‘Liability in subcontracting processes in the European construction sector’ published by the European Foundation for the Improvement of Living and Working Conditions (Dublin Foundation) in 2008.

Supportive tools/remedies available for posted worker – main problem inherent to socio-economic position of ‘average’ posted worker

Jurisdiction clause

With the exception of the UK, Article 6 of the PWD is explicitly implemented in all Member States, covered by this study.⁶⁵ In the UK the posting situations covered and the rights derived from the PWD were not clearly defined in national law, and the jurisdiction clause in Article 6 of the Directive was therefore not properly implemented. Nevertheless, EU workers⁶⁶ posted in the UK can bring a claim before the Employment Tribunal for, for example, unfair dismissal, non-payment of the minimum wage or disability discrimination, as they have the same protection as non-posted workers in the UK.⁶⁷

Locus standi for social partners and individual posted workers

Several Member States (Belgium, France, the Netherlands) not only implemented the jurisdiction clause with regard to and on behalf of the individual posted worker, but also *independently of the individual worker*, for representative workers’ and employers’ organizations, without prejudice to the right of a posted worker to take legal action himself, and to join or intervene in legal proceedings.

Since trade unions (and employers’ associations) in the host state may have an independent interest in enforcing host law labour standards on foreign service providers, this is good practice which deserves following by other Member States.

Recommendation 42

At EU level, an amendment to Article 6 PWD so as to make the option to give social partners locus standi an obligation is recommended. Besides this, the wording of Article 6 PWD must also stress that Member States are obliged to give individual posted workers locus standi before the courts in the host state. Currently, this is not the case in Sweden.

In this context the independent right to bring cases before the court and its quite effective use by the German holiday fund ULAK also merits attention. If not already provided for by **national** legislation, Member States may consider the possibility and added value of enabling a competent actor/authority to bring proceedings against a non-abiding employer (for such purposes as recovering outstanding wages).

Access to legal aid for posted workers

Posted workers (although not domiciled or resident in the host state) have equal access to the legal aid mechanisms provided by law in Belgium, France, Germany, the Netherlands, Luxembourg and Sweden, as long as they are EU nationals or regularly

⁶⁵ This was already clear from the Evaluation report of the EC in 2003. See also Novitz. Formula paper, footnote 36-38.

⁶⁶ It is not clear whether this implies the exemption of workers with a third country nationality.

⁶⁷ See: <http://www.thompsons.law.co.uk/ltxt/10640005.htm>

residing or domiciled in another Member State of the EU (except for Denmark). However, in accordance with the general principles operating in the UK in employment cases, no legal aid would be available for workers posted there. Nor do workers posted to Romania have access to legal aid, with the exception of such legal aid as can be provided from the trade union.

Recommendation 43

Although these findings are in line with EU law (notably the legal aid directive), an EU Communication might recommend the provision of access to legal aid for posted workers in countries where this is currently not available.

Non-use of jurisdiction clause by posted workers

In all the receiving Member States it seems at the time of writing that the right to take legal action has hardly or even never been used by posted workers nor by their representatives (with the possible exception of Germany). Set against the convincing (though anecdotal) evidence of (abusive) cases of non-compliance as reported in the national reports (see section 3.5 and Annex I), this must be interpreted as a clear signal that the jurisdiction clause in the PWD alone is not sufficient to provide an effective remedy. As several national reports concluded, most individual posted workers in practice only seem to become active if they have no choice. This applies to cases of severe occupational accidents (which may also stir surviving relatives and/or shocked colleagues to take action) or if no wage at all is paid and the employees cannot even pay their cost of living. In the latter cases the direct employer may have vanished and be untraceable.

The main causes for this passive and non-assertive attitude of posted workers are to be found in their often vulnerable or specific socioeconomic and societal position. Hence, the problem is mainly due to other reasons than inadequate implementation, application or enforcement of the PWD at national level, or the PWD as such. This is not to say that nothing should be done from a legal perspective. To the extent that procedural problems are detected (in some national reports), efforts should certainly be made to remove them. However, the main point to underscore in this context is the indispensable role of trade unions which, as set out in sections 3.2 and 4.5, together with other actors at grassroots level, try to reach posted workers, raise their level of awareness as to their rights, and ‘empower’ them.⁶⁸ Noteworthy are several accounts of both wildcat strikes and organized strikes on behalf of posted workers. At the same time it was found that efforts to unionize posted workers are not very successful, mainly for non-legal reasons (disinterest / fear / distrust of unions due to bad experience / image in country of origin, costs of membership). However, there are also signs of success in the growing awareness of mainly Polish posted workers, which indicates that trade union efforts should be sustained and not abandoned for a lack of financial resources (which was also reported several times).

⁶⁸ Inadequate as this may be, and also fuelled by the interests of domestic workers.

Recommendation 44

Therefore, we believe it is important to emphasize the long-term need to structurally promote and (financially and institutionally) support trade union (and/or social partner) ‘awareness and empowerment’ initiatives with regard to posted workers both at **national** and at **EU-level**.

Complaint mechanisms

Apart from legal remedies, mentioned above, in none of the countries are there specific complaint mechanism for posted workers to lodge complaints about non-compliance with the PWD. Posted workers can make use of the same methods of complaint as any other worker in these countries, such as contacting the trade unions or the labour inspection services with their complaints. However, these complaint mechanisms available under general domestic legislation may generally be considered as not understandable or accessible to posted workers (nevertheless, the role of ACAS in the collective Lindsey Oil Refinery dispute must not be underestimated). Hence, in practice, most posted workers do not complain about possible non-compliance, in some instances because they are afraid to do so, too, or because this could cause them to lose their job.⁶⁹

Recommendation 45

The lack of designated complaint mechanisms at **national level** should be remedied. Member States should exchange good practices in this regard, such as an anonym complaint procedure existing in Germany, to make it easier for posted workers to lodge a complaint. At **EU-level**, too, it would be necessary to initiate a complaint mechanism specifically aimed at posted workers (and their designated representatives) as an equivalent to the possibility for service providers to contact the Internal Market Problem Solving Network (SOLVIT) with complaints or queries.

⁶⁹ See also section 4.5, and section 4.2.

Annex I

List of cases in the media – countries in alphabetical order.

Belgium

1. *Struik Foods* – posting of Polish workers by Dutch posting agency to Belgium, strike action on behalf of dismissed Belgian workers.

< Het Nieuwsblad, “Arbeidsinspectie valt binnen bij Struik Foods”, 21/10/2005; Het Nieuwsblad, “Directie Struik Foods voelt zich bedrogen”, 22/10/2005 and Trends, “Staking bij Struik Foods”, 27/10/2005. Actuele vragen van de heren Filip Dewinter en Jan Laurys aan Frank Vandenbroucke, Vlaams minister van Werk, Onderwijs en Vorming, Handelingen Plenaire Vergadering Vlaams Parlement, 26 oktober 2005,

<http://www.vlaamsparlement.be/Proteus5/showJournaalLijn.action?id=416689>>

2. *La Corbeille* – vegetable-processing plant in Belgium, Dutch temporary work agency, Polish workers

< De Standaard, “Polen werken meer voor minder geld bij La Corbeille”, 25/10/2005>

3. *Mushroom cultivation*

- o 2006 Belgian cultivator, Polish employer, Polish workers, Polish labour conditions.
- o 2010 Belgian cultivator, seasonal work, replacement of Belgian workers with Polish workers.

< Het Laatste Nieuws, “Sociale inspectie vindt 22 onderbetaalde Polen bij Fresh Mushroom Europe”, 9/3/2006>

< De Standaard, “Zonder die Polen ga ik failliet”, 13/1/2010> -

4. Declaration by Minister Milquet on the transitional measures

< De Morgen, “Milquet geeft nog geen groen licht voor Poolse loodgieters”, 19/3/2009; De Tijd, “Milquet houdt Poolse arbeider buiten”, 19/3/2009 and De Morgen, “Clash over open grenzen kondigt zich aan in federale regering”, 20/3/2009>

5. *Dumping of injured illegal workers*, several instances (1 x construction)

<Het Laatste Nieuws, “Zwaargewonde illegaal ging ermee akkoord dat ik hem langs de weg achterliet”, 14/9/2005>

< Het Volk, “Zwartwerker gedumpt na fataal arbeidsongeval”, 23/1/2007>

6. *Social Fraud*, several instances – mainly Polish workers

< De Morgen, “Poolse werklui: 16 euro per uur”, 20/2/2010;

< Het Laatste Nieuws, “Reusachtige schadevergoeding voor uitbuiting Polen”, 8/4/2008;

< Het Laatste Nieuws, “Werken zonder vergunning”,

< 2/10/2008; Het Laatste Nieuws, “Polen sjoemelden met papieren”,

< 23/10/2008; Het Laatste Nieuws, “Man voor rechter voor zwartwerkers”, 24/10/2008>

Denmark

7. *Aarhus demonstration*, Construction, Polish workers, underpayment and 'fake' postings

<Jyllands Posten, “Blokade”, 2 March 2006

8. *Vytauto Rudmino II*, Construction project, employer Lithuanian, de facto established in DK, Lithuanian workers.

<Torben kragh, Fagbladet 3F, “Byggefag anmelder litauere til politiet”, 8 July 2010.

9. *Net Construction*, construction, Lithuanian company, Lithuanian workers, underpayment.
Maria Berg Badstue Pedersen, “Store bøde for underbetaling”, www.building-supply.dk/article/view.html?id=49012, 10 May 2010.

10. Copenhagen city court of 31 May 2005 – Danish recipient, foreign intermediary, Polish worker, transitional period, fictitious posting.
<Media reports at <http://www.bm.dk/pressemeddelelser/050531.asp> or http://www.lo.dk/smcms/Nyheder/LO_nyheder/5946/Index.htm?ID=5946&tID=48>

Estonia

No cases mentioned

France

11. The *CGT Saint-Nazaire disputes* – ship yard

- Ippokampos and Alstom, March – April 2002, Subcontracting, Greek employer, Greek workers, non-payment of wages, collective action, direct claim against recipient company (Alstom)
- August 2003 – 95 Rumanian workers, no further details provided.
- June 2003 – Specialized Polish sub-contractor, 60 Polish workers, underpayment and late payment.
- February 2003 – Portuguese workers, undeclared work.

http://www.travail-solidarite.gouv.fr/informations-pratiques.89/fiches-pratiques.91/detachement-de-salaries.407/le-detachement-temporaire-en.2452.html#sommaire_4>
<http://www.usm.cgt.fr/>

12. *Polish plumber* – discussion on the phenomenon, rather than a specific case.
Phrase coined by Philippe de Val in a special issue of *Charlie Hebdo* in December 2004

13. *France Telecom* – Subcontracting, Portuguese firm, Portuguese workers

14. *Easy-jet* – airline, British contracts, nationality of workers not mentioned
< *Liberation* 9 April 2010>

15. *Ryan Air* – airline, Irish contracts, nationality of workers not mentioned
< *Libération* 3/5/2010>

16. *Workers from Lituania* – sector unknown, employer from Luxembourg, workers from Lituania

17. *Metz case* – French couple, illegal provision of manpower, Polish workers
< *Le Republicain Lorrain*>

Germany

18. Meatcutters – several reports in the media, mainly workers from Eastern Europe

<<http://www.faz.net/s/Rub99C3EECA60D84C08AD6B3E60C4EA807F/Doc~E9B217920193B483DA1B37A6F79BB6FB6~ATpl~Ecommon~Scontent.htm>
<http://www.zeit.de/2004/16/Schlachthof-Mafia>
http://www.welt.de/wirtschaft/article1181716/Erste_Verhaftungen_im_Schlachthaus_Skandal.html>

19. Homecare for elderly people – several reports in the media, mainly workers from Eastern Europe

< http://www.hr-online.de/website/fernsehen/sendungen/index.jsp?rubrik=9020&key=standard_document_37664474
<http://www.sueddeutsche.de/politik/altenpflege-ohne-sie-geht-es-nicht-1.395234>
<http://www.sueddeutsche.de/politik/schwarzarbeit-in-der-haesuslichen-pflege-nothilfe-mit-nebenwirkungen-1.887004>
<http://www.sueddeutsche.de/wirtschaft/hartz-iv-und-die-folgen-die-billig-jobber-kommen-1.902164>
<http://www.sueddeutsche.de/wirtschaft/haushaltshilfen-die-taegliche-angst-entdeckt-zu-werden-1.917194>
<http://www.sueddeutsche.de/wirtschaft/diskussion-um-mindestloehne-arbeit-und-wuerde-1.824160>
<http://www.zeit.de/online/2009/05/mindestlohn-zeitarbeit-koalition>>

Italy

20. *The East Lindsey Dispute* – Construction site in UK, Italian contractor, Italian workers

21. *Romplanet*, Posting of Romanian workers

<R.Querzè, Corriere della sera- ed. Lombardia, 12 September 2008; this case is discussed by F. Lauria, *Pratiche di distacco transnazionale in Italia. Dall'approccio giuridico all'azione sindacale*, in M.Cilento (ed.), *I percorsi della solidarietà. Lavoro, mercato e diritti nell'Unione europea*, Edizioni lavoro, Roma, 2009, 156>

22. *Arenajobs* (and similar cases): Italian transport undertakings, Romanian TWA's and branch offices, Romanian truck drivers

< D.Apolloni, *Camionisti in affitto dall'est*, Sole 24 Ore, 10 May 2010, 5>

23. *Romanian nurses*: Italian health care institutions, Romanian TWA, Romanian workers

< inter alia Il Sole 24 Ore 4 July 2005 and Il Giornale 6 December 2009.

Luxembourg

24. *Kralowetz Case* – transport by road, employer registered in Luxembourg, operations based in Austria, truck drivers from central and eastern European countries.

<<http://www.eurofound.europa.eu/eiro/2002/02/feature/lu0202104f.htm>>

The Netherlands

25. *Media reports on Polish workers*

○ General behaviour and living conditions

< Polen wissen vijvers leeg, Dronken Pool in de gracht, Polen kloppen aan bij daklozenopvang>
< Poolse werknemers in hun tijdelijk onderkomen, NRC 13 aug 2007> < Uitzendkrachten uit Polen werken voor 3 euro, Telegraaf 26 October 2009>

○ Replacement of Dutch workers in 'sheltered' professions

< Poolse buschauffeurs in dienst bij GVB*, Parool 2009; Polen schoffelen bij WSW-bedrijf TBV, Vlaardingen, De Echo, 20 juli 2010, <http://www.echo.nl/ro-vl/zorg-en->

welzijn/ingezonden/1052759/polen.schoffelen.bij.wsw.bedrijf.tbv/?utm_campaign=rss&utm_source=rss&utm_medium=rss.>

26. *Abuses in agriculture*

- Bulgarians in Westland, housing conditions.
 - Asparagus cultivation, mostly Romanian and Portuguese workers, 'modern slavery'.
<http://www.ad.nl/ad/nl/1012/Binnenland/article/detail/499130/2010/07/21/Aspergeteelster-op-vrije-voeten.dhtml>
 - June 2010 mushroom cultivation sector
- < Champignon telers ontduikt regel', Volkskrant 16 juni 2010,
< 'Fraude is wijder verbreid dan champignon teelt', FD 16 juni 2010>
- July 2010 horticulture suspicion of money laundering by selling their crops to a foreign company, that hired Polish workers to bring in the harvest
- < Negen aanhoudingen in Brabant en Limburg', Brabants Dagblad 6 July 2010>
- 2009 Strawberry pickers – Polish workers, underpayment, strike action
- < Polen komen zonder kennis, Brabants Dagblad 21 August 2009>
- In general
- < [http://www.siod.nl/content/view/155/45/Mensenhandel en mensensmokkel: gevangenisstraf, werkstraffen en geldboetes geest](http://www.siod.nl/content/view/155/45/Mensenhandel_en_mensensmokkel:_gevangenisstraf,_werkstraffen_en_geldboetes_geest). Nieuwsbericht Openbaar Ministerie / Functioneel parket, 19 april 2010>

27. *Shrimp peelers - 2009 trafficking in human beings.*

<<http://www.nu.nl/algemeen/2050987/eigenaren-haags-pand-opgepakt-voor-mensenhandel.html>;
<[http://www.siod.nl/content/view/155/45/Mensenhandel en mensensmokkel: gevangenisstraf, werkstraffen en geldboetes geest](http://www.siod.nl/content/view/155/45/Mensenhandel_en_mensensmokkel:_gevangenisstraf,_werkstraffen_en_geldboetes_geest). Nieuwsbericht Openbaar Ministerie / Functioneel parket, 19 april 2010

28. *Unreliable temp agencies – no specific cases*

<: www.gewoongoodwerk.nl FNV Bondgenoten bij Albert Heijn Distributiecentra 05-02-2010>
<<http://www.youtube.com/watch?v=CcHZEQoscRQ&NR=1&feature=fvwp>; <http://www.polen-forum.nl/viewtopic.php?f=12&t=7682>>
< Uitzendkrachten uit Polen werken voor 3 euro, Telegraaf 26 October 2009>

29. *Strikes and other collective action*

- *Lettuce farm* – Strike of polish workers against 'slave labour conditions'
<http://nos.nl/artikel/51360-kweker-ontslaat-stakende-polen.html>. 15 July 2005.>
 - *Hazeldonk incident* – Transport, Polish truck drivers, Dutch transport company, Polish employer, strike action
< Staking met grof geweld beëindigd / Florence Imandt . 1 april 2009, BN De Stem 1 april 2009.
<http://www.bndestem.nl/algemeen/binnenland/4753922/Staking-met-grof-geweld-beeindigd.ece>> Nico
 - *Mooy case* – Strike of polish truckdrivers at Dutch transport company
- < Staking Polen bij transportbedrijf Nico Mooij voorbij, 4 December 2009. Source: <http://www.transport-online.nl/site/transportnieuws/index.php?printer=6400>.

30. *Center Parcs – German cleaning company, holiday parks in the Netherlands and Germany, collective action, payment according to Dutch or German CLA.*

<<http://www.depers.nl/binnenland/236662/Schoonmakersprotest-in-Heijen.html>; 22 and 27 August 2009>

31. *Deadly accidents* - January 2007, two cases of deadly occupational accident, Polish workers, Polish subcontractors, Dutch contractor, Dutch site.

<<http://www.netwerk.tv/uitzending/2007-01-16/het-beloofde-land-deel-ii>. Netwerk Uitzending van 7 and 16 January 2007>

32. *Struik case – See Belgium*

< NRC 21 okt 2005: Vast personeel werkt Polen weg>

Poland

No cases mentioned

Romania

33. *Romania - The Netherlands Dispute* – application of transitional measures to Romanian posted workers.

34. *Romania - Ireland Dispute* – dito

Sweden

35. *Berry Pickers* – Agriculture, Swedish contractor, Thai TWA, Thai workers, self-employed status and underpayment.

36. *Chinese Companies* – several incidences, underpayment and industrial accidents.

< Allt var fel från början till slut”, Byggvärlden 6.4.2009,

< Kinesisk drake i Upplandsskogen, DN.se 2.11.2007 and

< Kineser ännu utan avtal, Transportarbetaren, No 12, December 2006>

37. *Termostav-Mraz Dispute* – construction, furnace masons, Slovak company, fatal accident due to lack of risk assessment, underpayment of workers

<20 miljoner till ugnsmurarna, www.byggnadsarbetaren.se 2003-10-08; Slovaker får retroaktiv lön, www.byggindustrin.se 2003-10.09.>

38. *Preemraff Dispute* – Swedish company Preemraff, chain of subcontracting, Italian company Techimp, some 100 electricians; Thai TWA Vinc Placement, 200 plumbers.

< Grundlurade redan innan planet lyft, Byggnadsarbetaren No 8 May 2006; Konflikten vid Preemraff löst, <http://svt.se> 2005-09-07; Thailändare på Preemraff får vänta på sina pengar, <http://sverigesradio.se> 2005-09-19; Eltvåan räddade mer än en halv miljon kronor, www.lo.se>

39. *Skanska/Adecco case* – Swedish construction company, Polish workers employed by Swedish TWA Adecco, plans of re-employment by Polish Adecco daughter

United Kingdom

40. *East Lindsey dispute* – UK refinery, construction work, subcontracting, Italian company IREM, Italian workers, collective action, conflict over job opportunities and employment conditions according to NAECI.

< *Independent*, 20 May 2009>

< *Report of an Inquiry into the circumstances surrounding the Lindsey Oil Refinery Dispute*, conducted by the Advisory Conciliation and Arbitration Service (ACAS), published on 16 February 2009.>

41. *Tyne Tunnel dispute* – 2008 Construction, Union UCATT, French sub-contractor, Polish and Portuguese workers, payment not in accordance with the UCATT Working Rule Agreement

42. *Milford Haven Dispute* – Dutch contractor, unofficial collective action, local job opportunities; Subcontractor, Polish workers

Annex II

List of court cases relating to posting of workers – countries in alphabetical order

Belgium

1. Hof van Cassatie, 2 juni 2003, S.02.0039.N, R.S.Z. / Frangema Staal – Social security, Construction, Irish company, posting to Belgium, illegal provision of manpower.
2. Rb. Antwerpen, 21 May 2008 – Social security, Belgian shipping company Luxembourg branch, Polish and Slovak sailors
3. Corr. Oudenaarde, 19 February 2007 - Social security, Polish self-employed
4. Corr. Gent, 21 February 2007 – Social security, Belgium shipper, Czech TWA, Czech sailors,
5. Corr. Hasselt, 6 April 2008 – Social security, Belgian construction company, Hungarian subcontractor, Hungarian workers.
6. Cases C-369/96 and C-376/96 *Arblade and Leloup* [1999] ECR I-8453.
7. Case C-272/94 *Guiot* [1996] ECR I-1905.
8. Case 715/08, *Santos Palhota* a.o. ECJ 7 October 2010 not yet reported
9. Case C-433/04 *Commission vs. Belgium* [2006] ECR I-10653.
10. Case C-219/08 *Commission vs. Belgium* [2009] ECR I-.
11. Case ** *Commission vs. Belgium*, referred to ECJ on 3rd June 2010. See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/680&format=HTML&aged=0&language=EN&guiLanguage=en> (Limosa-declaration for self-employed persons)

Denmark

12. The Labour Court, 30 April 2008, Case A 2008.132, GAL-MET, Construction, Polish employer, Polish workers.
13. The Labour Court, 26 September 2008, Case A2007.642 - LO for Fagligt Fælles Forbund (3F) v. Sammenslutningen af Landbrugets Arbejdsgiverforeninger for Gartneri-, Land- og Skovbrugets Arbejdsgivere for Christiansminde Champignon, Polish or Lithuanian workers, posting or direct hiring
14. The Labour Court, 5 February 2009, Case A2008.041 - LO for Forbundet Træ-Industri-Byg i Danmark vs. Interflex ApS, Polish or Lithuanian workers, posting or direct hiring
15. Labour Court, 10 November 2005 Case A2005.839 Dansk Arbejdsgiverforening for Dansk Industri
16. City Court of Copenhagen, 31 May 2005 – transitional measures
17. Arbitration Tribunal, Net Construction – reported by Maria Berg Badstue Pedersen, “Store bøde for underbetaling”, www.building-supply.dk/article/view.html?id=49012 , 10 May 2010.
18. Arbitration tribunal’s order of 26 February 2010 in industrial arbitration case FV2009.0093, CO-industri for Fagligt Fælles Forbund, Dansk Metal and Blik- og Rørarbejderforbundet v DI-Organisation for erhvervslivet for Hammersen Elementbau & Co GmbH, Osnabück, Germany, Interzeit GmbH, Arnberg,

Germany, Claanbau Brandschutzanlagen GmbH, Hambrug, Germany and Karl Dungs A/S, Hedensted, Denmark.

Available on the Danish labour court's home page, <http://www.arbejdsretten.dk/generelt/arbejdsretlige-afgoerelser/faglige-voldgiftsretter/2010.aspx>.

Estonia

No cases mentioned

France

19. Cass. Crim 3 March 2009, n°07-81043, Bull.crim. 2009, n°50 – French apple juice company/agriculture, British intermediary, Polish workers, illegal provision of manpower
20. Cass. Soc. 9 October 2001, n°00-41452, Bull. Civ.V, n°303, p.243 – Bank manager, employer Argentinean, worker Argentinean, Unfair dismissal
21. Cass. Soc. 22 January 2009, n°08-41375 – French multinational, posting to Brazil, Colombia and Senegal, contributions to the French pension's scheme
22. Cass. Soc. 5 April 2007, n°05-21596, Bull.civ. II, n°90 –TWA, employer Portuguese, workers Portuguese, social security
23. Cass. Soc. 17 January 2007, n°05-17302 – French Hotel, Italian intermediary, South-African and Brazilian workers artists, social security.
24. Cass. Soc. 24 September 2009, n°08-17.523 – Construction site in Fr, British employer, British contracts, bogus self-employment
25. Cass. Civ. II, 4 December 2008, n°07-18292 – Lithuanian company “UAB Danimeda”, social security, accession of Lithuania to EU.
26. Cass. Civ. II, 2 October 2008, n°07-18286 – Spanish artist, social security

Germany

See Annex III of this study

Italy

27. Cassazione 7 June 2000, n.7743, in *Notiziario di giurisprudenza del lavoro* 2000, 769 – concept of posting in domestic law
28. Cassazione 16 February 2000, n.1733 in *Massimario di giurisprudenza italiana* 2000 – concept of posting in domestic law
29. Cassazione 18 August 2004, n.16165 in *Massimario di giurisprudenza del lavoro* 2004 – concept of posting in domestic law
30. Cassazione Sezioni Unite 26 October 2006, n.22910, in *Argomenti di diritto del lavoro*, 2007, 1011 ff. – posting in domestic law
31. Tribunale Amministrativo Regionale del Lazio, ordinanza 19 June 2009, n.2802/2009 (http://www.giustizia-amministrativa.it/DocumentiGA/Roma/Sezione3B/2009/200904134/Provvedimenti/200902802_05.XML) – requirements for TWA's, Romanian firm.
32. Consiglio di Stato, Sez. IV, 1 March 2006, n.928 (<http://www.giustizia-amministrativa.it/webcds/ElencoSentenze.asp>) confirming Administrative Regional Tribunal Bolzano 19 April 2005, n.140 in *Massimario di*

giurisprudenza del lavoro 2005, 658, Public procurement, requirement to register with construction fund. Austrian construction firm.

Luxembourg

- 33. Superior Court of Justice (Cour Supérieure de Justice), 6 May 2004, n°27710, not published – Parent company in Brasil, posting to Luxembourg, existence of employment relationship with Lux subsidiary.
- 34. Superior Court of Justice (Cour Supérieure de Justice), 11 December 2008, n°32630, not published – Luxembourg company, posting to Spain, right to recall
- 35. Court of Justice (Cour Supérieure de Justice), 25 May 2000, n°23761, not published – More favourable law, French or Luxembourg.
- 36. Superior Court of Justice (Cour Supérieure de Justice), 11 June 2009, n°34060, not published – Construction, CLA, Germany and Luxembourg, more favourable provision.
- 37. Conseil Supérieur des Assurances Sociales, 29.11.01, Creyf's Interim sa, n°2001/0172 – TWA, social security, previous employment

The Netherlands

No cases specified

Poland

No cases mentioned other than reported by SOLVIT Poland, see section 4.5

Romania

No cases mentioned

Sweden

- 38. Rimec, currently pending before the Labour court, claim by Building workers union on behalf of 36 Polish workers posted by Rimec, an Irish TWA.
- 39. C-341/05, Laval un Partneri, ECJ 18 December 2007, *ECR* p. I-11767. Construction, Latvian employer, Swedish contractor/related company, site in Sweden, workers

United Kingdom

- 40. Court of Appeal, 29 April 2008, EWCA Civ 430, Consistent Group v. Kalwak – TWA/food processing factories and hotels, Polish workers, employer for the purposes of unfair dismissal law

Anhang III: Rechtsprechungsübersicht zu D4

Weil die grundlegende Neufassung des AEntG erst im April 2009 in Kraft getreten ist, ist in den einschlägigen Rechtsprechungsdatenbanken (z.B. <http://www.juris.de>, <http://www.beck-online.de>, BAG) zur neuen Fassung bisher keine Rechtsprechung vorhanden. Bei der Suche nach Gerichtsentscheidungen im Bereich des AEntG muss daher auf die alte Fassung des AEntG (1996) zurückgegriffen werden.

Eine Gegenüberstellung der beiden Fassungen ergibt dabei folgendes Bild:

AEntG 1996	AEntG 2009
	<i>Abschnitt 1: Zielsetzung</i>
-	§ 1 Zielsetzung
	<i>Abschnitt 2: Allgemeine Arbeitsbedingungen</i>
§ 7 Abs. 1	§ 2 Allgemeine Arbeitsbedingungen
	<i>Abschnitt 3: Tarifvertragliche Arbeitsbedingungen</i>
§ 1 Abs. 1 § 1 Abs. 3a § 7 Abs. 2	§ 3 Tarifvertragliche Arbeitsbedingungen
§ 1 Abs. 1	§ 4 Einbezogene Branchen
§ 1 Abs. 1 § 1 Abs. 3 § 7 Abs. 2	§ 5 Arbeitsbedingungen
§ 1 Abs. 4 § 1 Abs. 1	§ 6 Besondere Regelungen
§ 1 Abs. 3a	§ 7 Rechtsverordnung
§ 1 Abs. 1 § 1 Abs. 2 § 1 Abs. 3 § 1 Abs. 3a	§ 8 Pflichten des Arbeitsgebers zur Gewährung von Arbeitsbedingungen
-	§ 9 Verzicht, Verwirkung
	<i>Abschnitt 4: Arbeitsbedingungen in der Pflegebranche</i>
-	§ 10 Anwendungsbereich
-	§ 11 Rechtsverordnung
-	§ 12 Kommission
-	§ 13 Rechtsfolgen
	<i>Abschnitt 5: Zivilrechtliche Durchsetzung</i>
§ 1a	§ 14 Haftung des Auftraggebers
§ 8	§ 15 Gerichtsstand
	<i>Abschnitt 6: Kontrolle und Durchsetzung durch staatliche Behörden</i>

§ 2 Abs. 1	§ 16 Zuständigkeit
§ 2 Abs. 2	§ 17 Befugnisse der Behörden der Zollverwaltung und anderer Behörden
§ 3 Abs. 1 § 3 Abs. 2 § 3 Abs. 3 § 3 Abs. 5	§ 18 Meldepflicht
§ 2 Abs. 2a § 2 Abs. 3	§ 19 Erstellen und Bereithalten von Dokumenten
§ 3 Abs. 4 § 3 Abs. 5 § 5 Abs. 6 § 5 Abs. 7	§ 20 Zusammenarbeit der in- und ausländischen Behörden
§ 6	§ 21 Ausschluss von der Vergabe öffentlicher Ämter
§ 4	§ 22 Zustellung
§ 5 Abs. 1 § 5 Abs. 2 § 5 Abs. 3 § 5 Abs. 4 § 5 Abs. 5	§ 23 Ordnungswidrigkeiten
	<i>Abschnitt 7: Schlussvorschriften</i>
-	§ 24 Evaluation
-	§ 25 Inkrafttreten, Außerkrafttreten

Von Relevanz sind dabei die folgenden Normen: § 8 Pflichten des Arbeitsgebers zur Gewährung von Arbeitsbedingungen; § 15 Gerichtsstand; § 18 Meldepflicht; § 23 Ordnungswidrigkeiten. Die gerichtlichen Verfahren im Bereich des AEntG sind übersichtlich. *Im Folgenden ist zu beachten, dass die gerichtlichen Entscheidungen in der Regel mehrere Paragraphen betreffen. Der Übersichtlichkeit halber wird die Rechtsprechung aber für die einzelnen Normen gesondert dargestellt.*

§ 1 AEntG (1996) = § 8 AEntG (2009)

Zwischen 2006 und 2010 betrafen ca. 50 Streitfälle die „Kernvorschrift“ des AEntG.

Nummer	Datum, Gericht, Az.	Schlagwörter, Normen
1	06.01.2010 Landesarbeitsgericht Hamburg 5. Kammer 5 Sa 33/09	Urteil Zwingende Arbeitsbedingungen nach AEntG - Kontrolle des Mindesteinkommens - Berücksichtigung von Sonderzahlungen - Gebäudereinigerhandwerk § 1 Abs 1 AEntG vom 21. Dezember 2007, § 4 TVG, § 1 Abs 3a AEntG vom 21. Dezember 2007, § 1 TVG
2	04.11.2009 Hessisches Landesarbeitsgericht 18. Kammer 18 Sa 1609/08	Urteil Sozialkassenverfahren im Baugewerbe - Geltungsbereich - Rohrleitungsbau - Tarifausslegung § 1 Abs 2 Abschn V Nr 25 VTV-Bau, § 1 Abs 1 AEntG, § 1 Abs 3 AEntG, § 8 Ziff 15.1 BauRTV, §

		133 BGB,...
3	30.10.2009 LArbG Berlin-Brandenburg 6. Kammer 6 Sa 219/09 und 6 Sa 311/09, 6 Sa 219/09, 6 Sa 311/09	Urteil Haftung des auftraggebenden Bauunternehmers in der Insolvenz des Nachunternehmers für Mindestlohnansprüche gegenüber Bundesagentur für Arbeit § 1a S 1 AEntG, § 1a S 2 AEntG, § 1 Abs 1 AEntG, § 187 S 1 SGB 3, § 183 Abs 1 SGB 3, ...
4	21.10.2009 BAG 10. Senat 10 AZR 73/09	Urteil Sozialkassenverfahren im Baugewerbe - betrieblicher Geltungsbereich - Gewerbe "Installateur und Heizungsbauer" § 1 Abs 2 Abschn VII Nr 12 VTV-Bau vom 12. November 1986, § 1 Abs 2 Abschn VII Nr 12 VTV-Bau vom 20. Dezember 1999, § 1 TVG, § 1 AEntG
5	21.10.2009 BAG 5. Senat 5 AZR 951/08	Urteil Mindestlohn bei Leiharbeit § 1 Abs 2a AEntG vom 24. April 2006, § 1 Abs 3a AEntG vom 24. April 2006, § 1 S 3 MalerArbV 3
6	17.09.2009 Landesarbeitsgericht Hamburg 8. Kammer 8 Sa 33/09	Urteil Gewährung des gesetzlich garantierten Mindestlohns im Gebäudereinigerhandwerk - Berücksichtigung aller dem Arbeitnehmer als Gegenleistung für die erbrachte Arbeitsleitung zustehenden Zahlungen - Verkehrsmittelzulage - Erschwerniszulage § 1 Abs 3a AEntG vom 21. Dezember 2007, § 4 Abs 3 TVG
7	16.09.2009 Hessisches Landesarbeitsgericht 18. Kammer 18 Sa 576/09	Urteil Sozialkassenverfahren im Baugewerbe - Beitragspflicht bei unbezahltem Urlaub § 8 Nr 1.1 BauRTV, § 8 Nr 2 BauRTV, § 8 Nr 4 BauRTV, § 8 Nr 8 BauRTV, § 21 VTV-Bau, ...
8	16.09.2009 Hessisches Landesarbeitsgericht 18. Kammer 18 Sa 170/09	Urteil Urlaubsentschädigung nach dem BauRTV bei unbezahlter Freistellung aus Polen entsandter Arbeitnehmer während des Arbeitsverhältnisses § 8 Nr 8 BauRTV, § 8 Nr 1 BauRTV, § 8 Nr 2 BauRTV, § 1 Abs 1 AEntG, § 8 Nr 7 BauRTV, ...
9	14.07.2009 Hessisches Landesarbeitsgericht 15. Kammer 15/11/7 Sa 2099/08	Urteil Arbeitnehmerüberlassung - Gebäudereinigung - Mindestentgelt § 1 Abs 1 AEntG vom 21. Dezember 2007, § 1 Abs 2 AEntG vom 21. Dezember 2007, § 1 Abs 3a AEntG vom 21. Dezember 2007, AÜG, § 5 TVG, ...
10	01.04.2009 BAG	Urteil Sozialkassenverfahren im Baugewerbe - Erstattung von

	10. Senat 10 AZR 134/08	Urlaubsvergütungen für einen Arbeitgeber mit Sitz im Ausland - Verfall § 1 Abs 1 AEntG vom 19. Dezember 1998, § 1 Abs 3 AEntG vom 19. Dezember 1998, § 1 TVG
11	19.03.2009 LArbG Berlin-Brandenburg 18. Kammer 18 Sa 2240/08	Urteil Nachwirkung des TV Mindestlohn Abbruch - ABM - Arbeitnehmereigenschaft - persönlicher Geltungsbereich § 1 Abs 3a AEntG, § 4 Abs 5 TVG, § 5 Abs 1 TVG, § 260 Abs 1 Nr 1 SGB 3
12	03.02.2009 Bayerischer Verfassungsgerichtshof Vf. 111-IX-08	Entscheidung Volksbegehren Bayerisches Mindestlohngesetz Art 9 Abs 3 GG, Art 31 GG, Art 70 GG, Art 74 Abs 1 Nr 12 GG, Art 67 Verf BY, ...
13	21.01.2009 BAG 10. Senat 10 AZR 325/08	Urteil Geltungsbereich des VTV - Verschweißen von Rohrleitungen aus Metall - Einschränkung der Allgemeinverbindlichkeitserklärung des VTV - Industriebetrieb § 1 TVG, § 1 Abs 3 S 2 AEntG, § 5 TVG, § 74 Anl 14 BauWiAusbV 1999
14	18.12.2008 Oberverwaltungsgericht Berlin-Brandenburg 1. Senat OVG 1 B 13.08	Urteil Verstoß der BriefArbbV gegen den Gesetzesvorbehalt nach Art. 80 GG wegen Überschreitung der gesetzlichen Ermächtigung des § 1 Abs. 3a AEntG; Feststellungsklage eines Arbeitgeberverbandes Art 9 Abs 3 GG, Art 12 Abs 1 GG, Art 19 Abs 4 GG, Art 20 Abs 3 GG, Art 80 Abs 1 GG, ...
15	25.11.2008 ArbG Leipzig 1. Kammer 1 Ca 2449/08	Urteil Sittenwidrige Vergütung im Bereich Briefdienstleistungen (Sortierer) - Wirksamkeit der Postmindestlohnverordnung § 138 Abs 1 BGB, § 612 Abs 1 BGB, § 612 Abs 2 BGB, § 1 Abs 3a S 1 AEntG, § 6 Abs 3 PostG, ...
16	19.11.2008 BAG 10. Senat 10 AZR 864/07	Urteil Sozialkassenverfahren im Baugewerbe - VTV - selbständige Betriebsabteilung eines ausländischen Subunternehmers in Deutschland - Bürgenhaftung - Darlegungs- und Beweislast § 1a S 1 AEntG, § 1 Abs 3 S 2 AEntG, § 1 Abs 1 S 1 AEntG, § 211 Abs 1 SGB 3 vom 1. Januar 2004, § 175 Abs 2 SGB 3, ...
17	08.10.2008 BAG 5. Senat 5 AZR 8/08	Urteil Anspruch auf Bezahlung der in einem Sanierungszeitraum geleisteten Überstunden - SanierungsTV Philipp Holzmann AG - Mindestlohn § 1 Abs 1 S 2 AEntG vom 19.

		Dezember 1998, § 1 Abs 1 S 3 AEntG vom 19. Dezember 1998, § 1 Abs 1 S 1 AEntG vom 19. Dezember 1998, § 3 Abs 1 TVG, § 4 Abs 1 S 1 TVG, ...
18	02.10.2008 Landesarbeitsgericht Niedersachsen 7. Kammer 7 Sa 462/08	Urteil Arbeitnehmerüberlassung - Mindestlohn - betrieblicher Geltungsbereich § 1 Abs 2 AEntG, § 1 TVG
19	18.08.2008 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 2180/06	Urteil Arbeitnehmerentsendung - Sozialkassenverfahren im Baugewerbe - Geltungsbereich § 1 TVG, § 1 Abs 3 S 2 AEntG, § 211 Abs 1 S 2 SGB 3
20	07.03.2008 VG Berlin 4. Kammer 4 A 439.07	Urteil Klage gegen Verordnung des Bundesministeriums für Arbeit und Soziales über zwingende Arbeitsbedingungen für die Branche Briefdienstleistungen vom 28. Dezember 2007 Art 3 Abs 1 GG, Art 9 Abs 3 GG, Art 12 Abs 1 GG, Art 19 Abs 4 GG, § 1 Abs 3a AEntG, ...
21	25.02.2008 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 1009/07	Urteil Arbeitnehmerentsendung - Betriebsabteilung - selbständige Betriebsabteilung § 1 Abs 3 S 2 AEntG, § 211 Abs 1 SGB 3, § 1 Abs 1 S 1 AEntG
22	11.02.2008 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 1517/05	Urteil Urlaubskassenverfahren des Baugewerbes - Geltungsbereich § 8 Nr 15 BauRTV, § 1 AEntG, § 5 TVG
23	10.12.2007 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 368/07	Urteil Tarifauslegung - Baugewerbe - Urlaubskassenverfahren - Begriff der selbständigen Betriebsabteilung § 1 TVG, § 211 Abs 1 S 1 SGB 3, § 1 Abs 1 S 3 AEntG, § 1 Abs 3 S 3 AEntG, § 1 Abs 3 S 2 AEntG, ...
24	10.12.2007 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 970/07	Urteil Arbeitnehmerentsendung - Unternehmenssitz im Ausland - Einschränkung der Allgemeinverbindlicherklärung der Baurarifverträge für Betriebe und selbständige Betriebsabteilungen § 1 Abs 3 AEntG, § 1 Abs 3 S 1 AEntG vom 19. Dezember 1998, § 1 Abs 3 S 2 AEntG vom 19. Dezember 1998, § 8 Ziff 15 BauRTV, Art 34 BGBEG, ...
25	07.12.2007 Hessisches Landesarbeitsgericht 10. Kammer	Urteil Geltungsbereich des VTV - Verschweißen von Rohrleitungen aus Metall - Einschränkung der

	10 Sa 541/07	Allgemeinverbindlichkeitserklärung des VTV - Industriebetrieb § 1 TVG, § 5 TVG, § 1 Abs 3 S 2 AEntG
26	21.11.2007 BAG 10. Senat 10 AZR 782/06	Urteil Arbeitnehmerentsendung - selbständige Betriebsabteilung § 1 Abs 3 S 1 AEntG vom 19. Dezember 1998, § 1 Abs 3 S 2 AEntG vom 19. Dezember 1998, § 1 Abs 1 AEntG vom 19. Dezember 1998, § 1 Abs 2 Abschn VI UAbs 1 S 2 BauRTV, § 8 Nr 15.1 BauRTV, ...
27	29.10.2007 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 2012/06	Urteil Arbeitnehmerentsendung - Bürgenhaftung - Unterbrechung - Verjährung § 211 Abs 1 SGB 3, § 1 Abs 1 AEntG vom 19. Dezember 1998, § 1a AEntG, § 1 Abs 3 S 2 AEntG vom 19. Dezember 1998, § 204 Abs 1 Nr 1 BGB, ...
28	22.10.2007 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 1194/06	Urteil Urlaubskasse - Baugewerbe - Beitragszahlung - Urlaubsvergütung - Erstattung - Verfall - Verjährung - Aufrechnung - Verzugszinsen § 1 Abs 3 S 2 AEntG, § 1 TVG, § 389 BGB, §§ 195ff BGB, § 195 BGB, ...
29	26.09.2007 BAG 10. Senat 10 AZR 415/06	Urteil Baugewerbe - Bergbau - Betriebsabteilung § 1 Abs 3 S 2 AEntG, § 211 Abs 1 SGB 3, § 1 TVG, § 2 Abs 1 Nr 1 BBergG
30	14.08.2007 BAG 9. Senat 9 AZR 167/07	Urteil Baugewerbe - Arbeitnehmerentsendung - Entschädigung für verfallene Urlaubsabgeltung - Schadensersatz § 8 Nr 8 BauRTV, § 8 Nr 7 BauRTV, Art 30 BGBEG, Art 34 BGBEG, Art 229 § 5 BGBEG,
31	18.07.2007 EuGH C-490/04	Urteil Vertragsverletzungsverfahren - freier Dienstleistungsverkehr - Arbeitnehmerentsendung - Beiträge an die nationale Urlaubskasse - Übersetzung von Unterlagen - Anmeldung des Einsatzortes der entsandten Arbeitnehmer § 1 Abs 3 AEntG, § 2 Abs 3 AEntG, § 3 Abs 2 AEntG, Art 49 EG, Art 1 EGRL 71/96, ...
32	12.07.2007 Landesarbeitsgericht Rheinland-Pfalz 4. Kammer 4 Sa 747/06	Urteil Sozialkassenverfahren im Baugewerbe - VTV - Einordnung eines Subunternehmers als selbständige Betriebsabteilung - Darlegungs- und Beweislast § 1 AEntG, § 1a AEntG, § 1 TVG, § 211 Abs 1 S 4 SGB 3, § 138 Abs 1

		ZPO, ...
33	04.06.2007 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 1444/05	Urteil Allgemeinverbindlicherklärung, Bautarifvertrag § 5 Abs 1 Nr 1 TVG, § 1 AEntG, § 8 Nr 15 BauRTV
34	28.03.2007 BAG 10. Senat 10 AZR 76/06	Urteil Arbeitnehmerentsendung - Bürgenhaftung § 1 AEntG, § 1a AEntG, § 14 Abs 1 BGB, Art 12 Abs 1 GG, § 211 Abs 1 SGB 3, ...
35	19.03.2007 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 1297/06	Urteil Zur Wiedereinsetzung in den vorigen Stand bei Berufungseinlegung durch Fax ohne Unterschrift und zum Verhältnis des luxemburgischen zum deutschen bautariflichen Urlaubsrecht § 8 Nr 15 BauRTV, § 3 Abs 1 TVG, § 233 ZPO, § 85 Abs 2 ZPO, § 4 Abs 3 TVG, ...
36	14.02.2007 BAG 10. Senat 10 AZR 63/06	Urteil Sozialkassenverfahren - Darlegung der Beitragshöhe § 1 Abs 3 S 2 AEntG, § 133 BGB, § 362 Abs 1 BGB, § 812 Abs 1 S 1 BGB, § 814 BGB, ...
37	11.12.2006 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 402/06	Urteil Urlaubsentschädigung § 8 Ziff 8 BauRTV, § 1 Abs 3 AEntG, § 1 Abs 1 AEntG
38	04.12.2006 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 273/06	Urteil Arbeitnehmerentsendung - Versäumung der Berufungsbegründungsfrist - Telefax - Wiedereinsetzung in den vorigen Stand § 520 Abs 3 ZPO, § 233 ZPO, § 1 AEntG, § 85 Abs 2 ZPO, § 64 Abs 6 ArbGG, ...
39	15.11.2006 BAG 10. Senat 10 AZR 665/05	Urteil Spezialitätsgrundsatz im Nachwirkungszeitraum § 2a Abs 1 Nr 4 ArbGG, § 97 ArbGG, § 1 Abs 3 AEntG, § 2 Abs 1 TVG, § 4 Abs 5 TVG, ...
40	06.11.2006 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 727/06	Urteil Urlaubskassenverfahren - Zur Auslegung der Einschränkung unter IV der Bekanntmachung der Allgemeinverbindlichkeitserklärung der Bautarifverträge vom 17.01.2000 § 1 TVG, § 3 Abs 1 TVG, § 4 Abs 2 TVG, § 5 Abs 4 TVG, § 138 Abs 1 ZPO, ...
41	23.10.2006 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 527/06	Urteil Arbeitnehmerüberlassung im Baubereich § 1 TVG, § 5 TVG, § 1 Abs 3 AEntG, § 1a AEntG, § 3 AEntG, ...
42	18.10.2006	Urteil Spezialitätsgrundsatz im

	BAG 10. Senat 10 AZR 576/05	Geltungsbereich des AEntG § 1 Abs 3 AEntG, § 5 Abs 4 TVG, § 61 Abs 2 S 1 ArbGG, § 91a Abs 1 ZPO, § 92 Abs 2 Nr 1 ZPO, ...
43	20.09.2006 BAG 6. Senat 6 AZR 752/05	Urteil Ansprüche auf Urlaubskassenbeiträge bei Entsendung nach Eröffnung des Konkursverfahrens in Polen § 1 Abs 3 AEntG, § 8 Ziff 15.1 BauRTV, § 1 TVG, § 164 Abs 2 BGB, § 80 InsO, ...
44	02.08.2006 BAG 10. Senat 10 AZR 348/05	Urteil Bürgenhaftung - Erklärung des Bürgen mit Nichtwissen § 1 AEntG, § 1a AEntG, § 3 AEntG, § 280 Abs 1 BGB, § 388 BGB, ...
45	02.08.2006 BAG 10. Senat 10 AZR 688/05	Urteil Bürgenhaftung - Erklärung des Bürgen mit Nichtwissen § 1 AEntG, § 1a AEntG, § 3 AEntG, § 566 Abs 2 BGB, § 767 Abs 1 BGB, ...
46	29.05.2006 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 1529/05	Urteil Arbeitnehmerentsendung - selbständige Betriebsabteilung - Urlaubskassenbeiträge - Tarifvertrag für das Sozialkassenverfahren im Baugewerbe § 1 AEntG, § 1 TVG, § 211 Abs 1 S 1 SGB 3, § 8 Ziff 15 BauRTV
47	03.05.2006 BAG 10. Senat 10 AZR 344/05	Urteil Urlaubskassenverfahren für Arbeitgeber aus der Schweiz § 1 AEntG, Art 34 BGBEG, § 197 BGB, § 201 BGB, § 242 BGB, ...
48	27.03.2006 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 723/05	Urteil Urlaubskassenbeitrag: Eintritt eines gesetzlichen Forderungsübergangs; gesamtschuldnerische Haftung des Erwerbers; Anwendung polnischen Rechts § 1 AEntG, § 613a BGB, § 33 Abs 3 BGBEG, Art 554 ZGB POL, Art 751 ZGB POL, ...
49	06.02.2006 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 1090/05	Urteil Arbeitnehmerentsendung - Bergbau - bauliche Betriebsabteilung i.S.v. § 211 Abs 1 S 4 SGB 3 § 1 Abs 3 S 2 AEntG, § 5 TVG, § 8 Ziff 15.1 BauRTV, § 8 Nr 15.1 BauRTV, § 211 Abs 1 S 4 SGB 3, ...
50	02.02.2006 Thüringer Oberlandesgericht Senat für Bußgeldsachen 1 Ss 97/05	Beschluss Ordnungswidrigkeitenrecht: Verjährungsbeginn beim echten Unterlassungsdelikt § 31 Abs 3 S 1 OWiG, § 206a StPO, § 260 Abs 3 StPO, § 1 Abs 1 S 2 AEntG, § 1 Abs 1 S 3 AEntG, ...

§ 8 AEntG (1996) = § 15 AEntG (2009)

Zum Klagerecht des entsandten Arbeitnehmers finden sich für die Jahre 2000-2010 lediglich drei Streitfälle.

Nummer	Datum, Gericht, Az.	Schlagwörter, Normen
1	02.07.2008 BAG 10. Senat 10 AZR 355/07	Urteil Internationale Zuständigkeit - Rügellose Einlassung Art 19 Abs 4 GG, § 39 ZPO, § 128 Abs 1 ZPO, § 128 Abs 2 S 1 ZPO, § 137 Abs 3 ZPO, ...
2	07.11.2005 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 636/05	Urteil Urlaubskassenbeiträge - Arbeitnehmerentsendung - Polen § 8 AEntG, § 1 Abs 3 AEntG, § 8 BauRTV, § 1 Abs 3 AEntG
3	11.09.2002 BAG 5. Senat 5 AZB 3/02	Beschluss Rechtsweg - Arbeitnehmerentsendung - Bürgenhaftung § 767 Abs 1 BGB, § 2 Abs 1 Nr 6 ArbGG, § 2 Abs 3 ArbGG, § 1 Abs 3 AEntG, § 1a AEntG, ...

§ 3 AEntG (1996) = § 18 AEntG (2009)

Ca. 37 Streitfälle betrafen von 2000-2010 die Meldepflicht.

Nummer	Datum, Gericht, Az.	Schlagwörter, Normen
1	21.11.2007 BAG 10. Senat 10 AZR 782/06	Urteil Arbeitnehmerentsendung - selbständige Betriebsabteilung § 1 Abs 3 S 1 AEntG vom 19. Dezember 1998, § 1 Abs 3 S 2 AEntG vom 19. Dezember 1998, § 1 Abs 1 AEntG vom 19. Dezember 1998, § 1 Abs 2 Abschn VI UAbs 1 S 2 BauRTV, § 8 Nr 15.1 BauRTV, ...
2	18.07.2007 EuGH C-490/04	Urteil Vertragsverletzungsverfahren - freier Dienstleistungsverkehr - Arbeitnehmerentsendung - Beiträge an die nationale Urlaubskasse - Übersetzung von Unterlagen - Anmeldung des Einsatzortes der entsandten Arbeitnehmer § 1 Abs 3 AEntG, § 2 Abs 3 AEntG, § 3 Abs 2 AEntG, Art 49 EG, Art 1 EGRL 71/96, ...
3	28.03.2007 BAG 10. Senat 10 AZR 76/06	Urteil Arbeitnehmerentsendung - Bürgenhaftung § 1 AEntG, § 1a AEntG, § 14 Abs 1 BGB, Art 12 Abs 1 GG, § 211 Abs 1 SGB 3, ...
4	02.08.2006 BAG 10. Senat 10 AZR 688/05	Urteil Bürgenhaftung - Erklärung des Bürgen mit Nichtwissen § 1 AEntG, § 1a AEntG, § 3 AEntG, § 566 Abs 2 BGB, § 767 Abs 1 BGB, ...
5	26.01.2006 EuGH	Urteil Soziale Sicherheit der Wanderarbeitnehmer -

	4. Kammer C-2/05	Zeitarbeitsunternehmen - anzuwendendes Recht - in einen anderen Mitgliedstaat entsandter Arbeitnehmer - Entsendebescheinigung - Tragweite der Bescheinigung E 101 - Bindung des zuständigen Trägers - keine Überprüfung der arbeitsrechtlichen Bindung durch Gaststaat Art 11 Abs 1 Buchst a EWGV 574/72 vom 25. Juni 1991, Art 14 Nr 1 Buchst a EWGV 1408/71 vom 25. Juni 1991, EWGV 2195/91
6	28.09.2005 BAG 10. Senat 10 AZR 28/05	Urteil Arbeitnehmerentsendung - selbständige Betriebsabteilung § 1 AEntG, Art 34 BGBEG, § 211 Abs 1 SGB 3, § 138 Abs 2 ZPO, Art 49 EG, ...
7	14.04.2005 EuGH C-341/02	Urteil EGRL 71/96 - Baugewerbe - Zulagen und Zuschläge als Bestandteile des Mindestlohns im Rahmen der Entsendung von Arbeitnehmern Art 3 EGRL 71/96, Art 49 EG, § 1 Abs 1 AEntG
8	25.01.2005 BAG 9. Senat 9 AZR 258/04	Urteil Arbeitnehmerentsendung - Baugewerbe - Betriebsabteilung - Darlegungs- und Beweislast § 1 Abs 1 AEntG, § 1 Abs 3 AEntG, § 211 SGB 3, § 138 ZPO, § 8 Nr 15 BauRTV, ...
9	25.01.2005 BAG 9. Senat 9 AZR 146/04	Urteil Arbeitnehmerentsendung - Betriebsabteilung § 8 BauRTV, § 1 TVG, § 1 Abs 1 AEntG, § 1 Abs 3 AEntG, § 138 ZPO, ...
10	25.01.2005 BAG 9. Senat 9 AZR 620/03	Urteil Urlaubskassenverfahren der Bauwirtschaft - tschechischer Bauarbeitgeber Art 34 BGBEG, § 1 AEntG, § 1 TVG, § 8 Nr 15 BauRTV, § 67 ArbGG, ...
11	25.01.2005 BAG 9. Senat 9 AZR 44/04	Urteil Urlaubskassenverfahren des Baugewerbes - betrieblicher Geltungsbereich § 67 ArbGG, § 1 TVG, § 1 AEntG, § 211 Abs 1 SGB 3, § 529 ZPO, ...
12	12.01.2005 BAG 5. Senat 5 AZR 617/01	Urteil Bürgenhaftung bei Arbeitnehmerentsendung § 1a AEntG, § 14 Abs 1 BGB, Art 12 Abs 1 GG, § 1 AEntG, § 5 AEntG, ...
13	12.01.2005 BAG 5. Senat 5 AZR 279/01	Urteil Bürgenhaftung bei Arbeitnehmerentsendung § 1a AEntG, § 187 SGB 3, § 211 Abs 1 SGB 3, § 14 Abs 1 BGB, Art 12 Abs 1 GG, ...

14	29.12.2004 BVerfG 1. Senat 2. Kammer 1 BvR 2283/03, 1 BvR 2504/03, 1 BvR 2582/03	Nichtannahmebeschluss Nichtannahmebeschluss: Keine Verletzung von Grundrechten durch Neuregelung der Arbeitnehmerüberlassung – hier: AÜG § 3 Abs 1 Nr 3, § 9 Nr 2 u § 10 Abs 4 Art 3 Abs 1 GG, Art 12 Abs 1 GG, Art 9 Abs 3 GG, § 3 Abs 1 Nr 3 AÜG vom 23. Dezember 2002, § 9 Nr 2 AÜG vom 23. Dezember 2002, ...
15	12.10.2004 EuGH C-60/03	Urteil Art 49 EG - Beschränkungen des freien Dienstleistungsverkehrs - Bauunternehmen - Subunternehmer - Verpflichtung eines Unternehmens, als Bürge für die Zahlung eines Mindestentgelts an die von einem Nachunternehmen beschäftigten Arbeitnehmer zu haften § 1a AEntG, Art 12 Abs 1 GG, Art 49 EG, Art 1 EGRL 71/96, Art 5 EGRL 71/96, ...
16	04.10.2004 Hessisches Landesarbeitsgericht 16. Kammer 16/15 Sa 143/03	Urteil Arbeitnehmerentsendung - Mindestbeiträge § 1 Abs 3 S 2 AEntG, § 8 Ziff 15.1 BauRTV, § 1 Abs 3 S 1 AEntG, § 211 Abs 1 SGB 3, § 1 Abs 1 AEntG, ...
17	20.07.2004 BAG 9. Senat 9 AZR 343/03	Urteil Urlaubskassenverfahren für Arbeitgeber aus Portugal § 8 BauRTV, § 1 AEntG vom 16. Dezember 1997, § 1 AEntG vom 26. Februar 1996, § 1 AEntG vom 19. Dezember 1998, § 1 TVG, ...
18	20.07.2004 BAG 9. Senat 9 AZR 345/03	Urteil Arbeitnehmerentsendung - Bürgenhaftung - Kroatien § 8 Nr 15 BauRTV, § 1 TVG, § 1 AEntG, § 1a AEntG, Art 3 Abs 1 GG, ...
19	19.05.2004 BAG 5. Senat 5 AZR 449/03	Urteil Arbeitnehmerentsendung - Anspruch auf Überstundenzuschläge § 1 Abs 1 S 1 Nr 1 AEntG, Art 3 Abs 1 EGRL 71/96, § 3 Nr 6.11 BauRTV
20	05.04.2004 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 1504/03	Urteil Arbeitnehmerentsendung § 1 TVG, § 3 TVG, § 5 TVG, § 1 Abs 3 AEntG, § 1 Abs 4 AEntG, ...
21	29.03.2004 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 1503/03	Urteil Arbeitnehmerentsendung § 8 Ziff 15.1 BauRTV, § 1 Abs 3 AEntG, § 1 Abs 1 AEntG, § 1 Abs 4 AEntG, § 211 Abs 1 SGB 3, ...
22	17.09.2003 ArbG Hannover 12. Kammer	Beschluss Örtliche Zuständigkeit - Arbeitnehmerentsendung - beauftragter Unternehmer - Bürge § 1 AEntG, § 1a

	12 Ca 472/03	AEntG, § 48 Abs 2 S 1 Nr 2 ArbGG, § 211 Abs 1 SGB 3
23	14.07.2003 Hessisches Landesarbeitsgericht 16. Kammer 16 Sa 530/02	Urteil Tarifpluralität - Geltungsbereich der Bautarifverträge § 1 TVG, § 3 Abs 1 TVG, § 4 Abs 2 TVG, § 5 Abs 4 TVG, § 1 Abs 3 S 2 AEntG, ...
24	06.03.2003 BSG 11. Senat B 11 AL 27/02 R	Urteil Arbeitnehmerentsendung - grenzüberschreitende Arbeitnehmerüberlassung - Umfang der Meldepflicht - Beschränkung des freien Dienstleistungsverkehrs - Zulässigkeit - Feststellungsklage § 1 Abs 2a AEntG, § 3 Abs 2 AEntG, § 3 Abs 3 AEntG, Art 49 EG, Art 50 EG, ...
25	06.11.2002 BAG 5. Senat 5 AZR 617/01 (A)	EuGH-Vorlage Bürgenhaftung für Mindestlohn § 1 Abs 1 AEntG, § 1a AEntG, Art 12 Abs 1 GG, Art 49 EG, Art 234 EG, ...
26	09.10.2002 Bayerisches Oberstes Landesgericht 3. Senat für Bußgeldsachen 3 ObOWi 83/02	Beschluss Verstoß gegen das Arbeitnehmerentsendegesetz: Tariflich festgelegter Mindestlohn für polnische Arbeitnehmer Art 44 Abs 3 EGA bk POL, Art 55 EGA bk POL, § 1 Abs 4 AEntG, § 211 Abs 1 SGB 3, § 1 BauArbbV, ...
27	11.09.2002 BAG 5. Senat 5 AZB 3/02	Beschluss Rechtsweg - Arbeitnehmerentsendung - Bürgenhaftung § 767 Abs 1 BGB, § 2 Abs 1 Nr 6 ArbGG, § 2 Abs 3 ArbGG, § 1 Abs 3 AEntG, § 1a AEntG, ...
28	05.08.2002 Bayerisches Oberstes Landesgericht 3. Senat für Bußgeldsachen 3 ObOWi 65/2002, 3 ObOWi 65/02	Beschluss Arbeitnehmerentsendung: Pflicht von rumänischen Unternehmen zur Zahlung des Mindestlohns an in Deutschland tätige Bauarbeiter § 211 Abs 1 SGB 3, § 1 Abs 4 AEntG, § 1 BauArbbV
29	25.06.2002 BAG 9. Senat 9 AZR 405/00	Urteil Erstreckung der tariflichen Vorschriften über die Urlaubskasse des Baugewerbes auf Arbeitgeber mit Sitz in Polen, die Arbeitnehmer nach Deutschland entsenden Art 9 Abs 3 GG, § 1 AEntG, § 1 TVG, § 5 TVG, § 8 BauRTV, ...
30	25.06.2002 BAG 9. Senat 9 AZR 439/01	Urteil Arbeitnehmerentsendung - Urlaubskasse Baugewerbe - Slowakische Republik § 1 AEntG, § 5 TVG, § 1 TVG, Art 34 BGBEG, § 285 SGB 3, ...
31	28.05.2002	Beschluss Verstoß gegen das

	Bayerisches Oberstes Landesgericht 3. Senat für Bußgeldsachen 3 ObOWi 29/02	Arbeitnehmerentsendegesetz: Nichtgewährung des Mindestlohns § 1 Abs 1 AEntG, § 5 Abs 1 Nr 1 AEntG
32	24.01.2002 EuGH 5. Kammer C-164/99	Urteil Beschränkung des freien Dienstleistungsverkehrs innerhalb der EG: Vorabentscheidungsersuchen zu Frage der Ungleichbehandlung inländischer und ausländischer Arbeitnehmer der Baubranche bei der Beurteilung einer Unterschreitung tarifvertraglich festgelegten Mindestlohns Art 1 EGRL 71/96, Art 1ff EGRL 71/96, Art 49 EG, Art 50 EG, Art 234 EG, ...
33	25.10.2001 EuGH C-493/99	Urteil Vertragsverletzung eines Mitgliedstaates - Artikel 52 und 59 EG- Vertrag (nach Änderung jetzt Artikel 43 EG und 49 EG) - Nationale Rechtsvorschriften über die Arbeitnehmerüberlassung im Baugewerbe - Ausschluß von Unternehmen, die nicht an einem Tarifvertrag des Sektors beteiligt sind und keine Niederlassung im Mitgliedstaat der Dienstleistung haben - Verhältnismäßigkeit Art 52 EGVtr, Art 59 EGVtr, AÜG
34	25.10.2001 EuGH C-49/98, C-50/98, C-52/98 bis C- 54/98, C-68/98 bis C-71/98, C- 49/98, ...	Urteil Freier Dienstleistungsverkehr - Vorübergehende Entsendung zur Erfüllung eines Vertrages - Jahresurlaub und Urlaubsgeld Art 59 EGVtr, Art 60 EGVtr, § 1 Abs 3 AEntG
35	25.07.2001 OLG Karlsruhe 3. Strafsenat 3 Ss 159/00	Beschluss Arbeitnehmerüberlassung: Umfang der Meldepflicht des ausländischen Arbeitgebers § 1 Abs 1 AEntG, § 1 Abs 2a AEntG, § 3 Abs 2 AEntG, § 5 Abs 1 Nr 3 AEntG, Art 59 Abs 1 EGVtr, ...
36	18.07.2000 BVerfG 1. Senat 2. Kammer 1 BvR 948/00	Nichtannahmebeschluss Nichtannahmebeschluss: Kein Verstoß gegen GG Art 9 Abs 3 und GG Art 80 Abs 1 S 2 durch Erstreckung von Regelungen des Mindestlohn-Tarifvertrags auf Arbeitgeber, die keiner tarifvertragsschließenden Partei angehören <BauArbbV iVm AEntG § 1 Abs 3a> § 1 BauArbbV, § 1 Abs 3a AEntG vom 19. Dezember 1998, Art 9 Abs 3 GG, Art 80 Abs 1 S 2 GG, § 5 TVG, ...
37	16.03.2000 OLG Düsseldorf	Beschluss Arbeitnehmerentsendung: Vereinbarkeit der Meldepflicht für

	1. Senat für Bußgeldsachen 2b Ss (OWi) 2/00 - (OWi) 9/00 I	ausländische Arbeitnehmer mit EG-Recht § 3 AEntG, EGVtr
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§ 5 AEntG (1996) = § 23 AEntG (2009)

Von 2000-2010 betrafen ca. 25 Verfahren den Bereich Ordnungswidrigkeiten.

Nummer	Datum, Gericht, Az.	Schlagwörter, Normen
1	27.08.2009 Thüringer Oberlandesgericht 1. Strafsenat 1 Ss 213/09	Beschluss Zum Strafklageverbrauch bei Einstellung des Strafverfahrens wegen des Vorwurfs der ... § 266a StGB, § 5 Abs 1 AEntG, § 84 Abs 1 OWiG, § 153a StPO, § 264 StPO, ...
2	09.04.2009 OLG Oldenburg (Oldenburg) Senat für Bußgeldsachen SsBs 48/09	Beschluss Verfahrenshindernis der Einstellung eines strafprozessualen Ermittlungsverfahrens für ein Ordnungswidrigkeitenverfahren: Eine prozessuale Tat der fahrlässigen Nichtzahlung des Mindestlohnes und der Veruntreuung von Arbeitsentgelt durch Nichtzahlung von Sozialversicherungsbeiträgen § 266a StGB, § 5 Abs 1 Nr 1 AEntG, § 153a StPO
3	02.02.2006 Thüringer Oberlandesgericht Senat für Bußgeldsachen 1 Ss 97/05	Beschluss Ordnungswidrigkeitenrecht: Verjährungsbeginn beim echten Unterlassungsdelikt § 31 Abs 3 S 1 OWiG, § 206a StPO, § 260 Abs 3 StPO, § 1 Abs 1 S 2 AEntG, § 1 Abs 1 S 3 AEntG, ...
4	01.11.2005 Thüringer Oberlandesgericht Senat für Bußgeldsachen 1 Ss 222/05	Beschluss Arbeitszeitznachweis: Vermeidbarkeit des Gebotsirrtums bei unterlassener Dokumentation der Arbeitszeit § 2 Abs 2a AEntG, § 5 Abs 1 Nr 3 AEntG, § 5 Abs 1 Nr 6 AEntG, § 10 OWiG, § 11 Abs 2 OWiG, ...
5	25.10.2005 AG Saarbrücken 43 326-04	Urteil Zahlungspflicht von Urlaubsgeld nach Arbeitnehmerentsendegesetz im Einzelfall ... § 2 Abs 3 AEntG vom 22. Juli 2004, § 5 Abs 1 Nr 3 AEntG vom 22. Juli 2004, § 1 AEntG vom 22. Juli 2004
6	04.08.2005 LG Saarbrücken 8. Strafkammer 8 Qs 75/05	Beschluss Ordnungswidrigkeitsverfahren: Anordnung des dinglichen Arrests in das Vermögen eines polnischen Unternehmens § 29a Abs 2 OWiG, § 111d Abs 2 StPO, § 917 ZPO, § 5 AEntG
7	03.05.2005 Thüringer Oberlandesgericht 1. Strafsenat 1 Ss 115/05	Beschluss Grenzüberschreitende Dienstleistung: Pflicht des Arbeitgebers zur Fertigung und Aufbewahrung von Arbeitszeitznachweisen § 2 Abs 2a AEntG, §

		5 Abs 1 Nr 3 AEntG vom 13. Dezember 2001, § 5 Abs 1 Nr 3 AEntG vom 23. Juli 2002
8	12.01.2005 BAG 5. Senat 5 AZR 617/01	Urteil Bürgenhaftung bei Arbeitnehmerentsendung § 1a AEntG, § 14 Abs 1 BGB, Art 12 Abs 1 GG, § 1 AEntG, § 5 AEntG, ...
9	12.01.2005 BAG 5. Senat 5 AZR 279/01	Urteil Bürgenhaftung bei Arbeitnehmerentsendung § 1a AEntG, § 187 SGB 3, § 211 Abs 1 SGB 3, § 14 Abs 1 BGB, Art 12 Abs 1 GG, ...
10	19.08.2004 Thüringer Oberlandesgericht 1. Strafsenat 1 Ss 93/04	Beschluss Bußgeldverfahren wegen Mindestlohnunterschreitung im Baugewerbe: Notwendige Tatsachenfeststellungen des Bußgeldrichters; Bemessung der Geldbuße § 1 Abs 1 AEntG, § 2 Abs 2 Buchst a AEntG, § 2 Abs 3 AEntG, § 5 AEntG, § 71 Abs 1 OWiG, ...
11	27.05.2003 OLG Hamm 4. Senat für Bußgeldsachen 4 Ss OWi 386/03	Beschluss Meldepflichten bei Arbeitnehmerentsendung für Bauleistungen: Verneinung ordnungswidrigen Verhaltens bei unterlassener Anzeige kurzfristig eingetretener Änderungen § 5 Abs 1 Nr 3 AEntG, § 3 Abs 1 AEntG
12	03.04.2003 Brandenburgisches Oberlandesgericht 2. Senat für Bußgeldsachen 2 Ss (OWi) 158B/02	Beschluss Verstoß gegen tarifliche Mindestbedingungen nach AEntG: Erkundigungspflicht des Unternehmers § 1 Abs 1 AEntG, § 5 AEntG, § 211 Abs 1 SGB 3
13	27.11.2002 Bayerisches OLG 3 ObOWi 92/02	Beschluss Vereinbarung zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der ... § 1 Abs 1 AEntG, § 5 Abs 1 Nr 1 AEntG, § 5 Abs 3 AEntG, Art 1 Abs 1 Richtlinie 96/71/EG, Art 1 Abs 4 Richtlinie 96/71/EG, ...
14	27.11.2002 Bayerisches OLG 3. Senat für Bußgeldsachen 3 ObOWi 93/2002, 3 ObOWi 93/02	Beschluss Nichtgewährung des Mindestlohns an ausländische Arbeitnehmer: Berechnung des Mindestlohns § 1 Abs 1 AEntG, § 5 Abs 1 Nr 1 AEntG, § 5 Abs 3 AEntG, Art 1 Abs 1 EGRL 71/96, Art 1 Abs 4 EGRL 71/96, ...
15	28.05.2002 Bayerisches OLG 3. Senat für Bußgeldsachen 3 ObOWi 29/02	Beschluss Verstoß gegen das Arbeitnehmerentsendegesetz: Nichtgewährung des Mindestlohns § 1 Abs 1 AEntG, § 5 Abs 1 Nr 1 AEntG
16	30.01.2002	Beschluss Arbeitnehmerentsendung:

	OLG Hamm 2. Senat für Bußgeldsachen 2 Ss OWi 1175/2001, 2 Ss OWi 1175/01	Ordnungswidrige Nichtzahlung von Verpflegungsgeld; Begriff der Bauleistung § 1 Abs 1 AEntG, § 5 Abs 1 AEntG, § 211 Abs 1 SGB 3
17	30.11.2001 OLG Celle 2. Senat für Bußgeldsachen 322 Ss 217/01 (OWiz)	Beschluss Bußgeldbewehrte Arbeitnehmerentsendung: Erforderliche Urteilsfeststellungen bei Lohnunterschreitung durch eine juristische Person polnischen Rechts § 1 Abs 1 AEntG, § 1 Abs 4 AEntG, § 5 Abs 1 Nr 1 AEntG, § 30 Abs 1 OWiG, § 30 Abs 4 OWiG, ...
18	28.09.2001 KG Berlin 5. Senat für Bußgeldsachen 2 Ss 437/98 - 5 Ws (B) 132/99, 2 Ss 437/98, 5 Ws (B) 132/99	Beschluss Bußgeldbewehrte Zuwiderhandlungen gegen das Arbeitnehmerentsendegesetz: Vereinbarkeit von Bußgeldbestimmungen mit Gemeinschaftsrecht; Vorlagepflicht zum EuGH; unangemeldete Beschäftigung von portugiesischen Arbeitnehmern unterhalb des Mindestlohns auf einer deutschen Baustelle § 1 Abs 1 S 1 AEntG, § 1 Abs 1 S 2 AEntG, § 3 Abs 1 AEntG, § 5 Abs 1 Nr 1 AEntG, § 5 Abs 1 Nr 3 AEntG, ...
19	25.07.2001 OLG Karlsruhe 3. Strafsenat 3 Ss 159/00	Beschluss Arbeitnehmerüberlassung: Umfang der Meldepflicht des ausländischen Arbeitgebers § 1 Abs 1 AEntG, § 1 Abs 2a AEntG, § 3 Abs 2 AEntG, § 5 Abs 1 Nr 3 AEntG, Art 59 Abs 1 EGVtr, ...
20	27.04.2001 LG Kiel 10. Große Strafkammer 46 Qs 27/01	Beschluss Beschwerde gegen eine richterliche Durchsuchungsanordnung: Unzulässigkeit bei Nichtdurchführung der Durchsuchung wegen Einstellung des Ermittlungsverfahrens Art 13 Abs 1 GG, Art 13 Abs 2 GG, Art 19 Abs 4 GG, § 1 AEntG, § 5 Abs 2 AEntG, ...
21	22.12.2000 BVerfG 1. Senat 2. Kammer 1 BvR 2043/00	Nichtannahmebeschluss Nichtannahmebeschluss: Aus Subsidiaritätsgründen unzulässige Verfassungsbeschwerde eines ausländischen Arbeitgebers gegen die Verurteilung in einem Bußgeldverfahren wegen unterlassener Zahlungen an die Urlaubs- und Lohnausgleichskasse der Bauwirtschaft § 1 Abs 3 S 1 Nr 1 AEntG, § 5 Abs 1 Nr 2 AEntG, § 87 Abs 3 S 1 OWiG, § 87 Abs 3 S 2 OWiG, § 87 Abs 6 OWiG, ...
22	25.09.2000	Beschluss Arbeitnehmerentsendung:

	Bayerisches OLG 3. Senat für Bußgeldsachen 3 ObOWi 78/2000, 3 ObOWi 78/00	Berechnung des Mindeststundenbruttolohns für polnische Arbeitnehmer § 1 Abs 1 S 1 Nr 1 AEntG, § 5 Abs 1 Nr 1 AEntG
23	05.07.2000 OLG Hamm 2. Senat für Bußgeldsachen 2 Ss OWi 462/00	Beschluss Verstoß gegen das Arbeitnehmerentsendegesetz durch eine juristische Person; Festsetzung der Geldbuße § 1 Abs 3 S 2 AEntG, § 2 Abs 3 AEntG, § 3 AEntG, § 5 Abs 1 Nr 2 AEntG, § 5 Abs 1 Nr 3 AEntG, ...
24	28.06.2000 OLG Hamm 2. Senat für Bußgeldsachen 2 Ss OWi 604/1999, 2 Ss OWi 604/99	Beschluss Bußgeldbewehrte Arbeitnehmerentsendung: Rechtsanwendung im Verhältnis inländischer Arbeitnehmer zu inländischen Arbeitgebern; notwendige Feststellungen bei Arbeitgeberstellung einer juristischen Person; Begründung der Bußgeldbemessung § 1 Abs 1 S 3 AEntG, § 5 Abs 1 Nr 1 AEntG, § 9 AEntG, § 17 Abs 4 OWiG, § 30 OWiG, ...
25	21.03.2000 BGH 4. Strafsenat 4 StR 287/99	Beschluss Vorlegung einer Strafsache zum Bundesgerichtshof: Unzulässigkeit nach Klarstellung einer unterschiedlich ausgelegten Vorschrift durch neuen Gesetzgebungsakt § 121 Abs 2 GVG, § 1 Abs 1 S 3 AEntG vom 26. Februar 1996, § 1 Abs 1 S 4 AEntG vom 26. Februar 1996, § 5 Abs 1 Nr 1 AEntG vom 26. Februar 1996, § 1 Abs 1 S 3 AEntG vom 19. Dezember 1998, ...

Anhang IV: Liste der in Deutschland für allgemeinverbindlich erklärten Tarifverträge²⁷⁸

Anhang V: Vordruck Meldebogen nach § 18 Abs. 1 AEntG

²⁷⁸ Quelle:
http://www.bmas.de/portal/38140/property=pdf/arbeitsrecht__verzeichnis__allgemeinverbindlicher__tarifvertraege.pdf